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A

TREATISE

ON

THE JURISDICTION

OF

THE HIGH COURT OF ADMIRALTY

OF

England.

BY

EDWIN EDWARDS, ESQ.

OF DOCTORS' COMMONS.

" Non illi imperium pelagi sævumque tridentem,
Sed mihi forte datum." *Æneid.* lib. i.

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PREFACE.

THE compilation of this Treatise on the Jurisdiction of the High Court of Admiralty has been executed with the idea that some labour devoted to that subject exclusively might be useful to the profession. The assertion, that at the present day there is no work on Admiralty jurisdiction of *practical* utility, is one which is neither disrespectful to the labours of those who, in earlier times, devoted their talents to the subject, nor, when we consider the state of that jurisdiction as altered and revised by recent enactments of the Legislature, is it one which is liable to contradiction. It is a subject of some importance; for, although it is true that in many cases which will be specified the courts of Common Law have a jurisdiction concurrent with that court, in so many instances it happens that a full remedy might have been obtained by the more summary and more secure proceeding of the Court of Admiralty, whilst that in the courts of Common Law has been worse than inadequate to the relief demanded. The necessity of a work of this title would appear to exist as much now as when this jurisdiction was less settled, its limits less ascertained, and consequently the more liable to controversy. To supply this deficiency, to point out the limits now assigned to that jurisdiction, and

to illustrate the advantages of the próceeding in that court, is the object of this Treatise.

Notwithstanding that his anxiety to attempt this task has been greater than his competency to execute it, the writer hopes that, as an Index to the great authorities which are frequently cited in them, the following pages may suggest information to some, and that others may discover therein something wherewith to refresh their memories,—*ament meminisse periti;* and with this hope, however vain, they are left to the indulgent consideration of the public.

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A TREATISE

ON THE

JURISDICTION

OF

THE HIGH COURT OF ADMIRALTY OF ENGLAND.

CHAPTER I.

OF THE ANTIQUITY OF THE JURISDICTION OF THE ADMIRALTY COURT.

THE Jurisdiction of the High Court of Admiralty, resting, as it now does, upon a basis so firmly established by our statute law, and independent of that authority which it has derived from ancient custom, renders any inquiry respecting its origin a subject more fit for the research of the antiquarian than for that of the lawyer.

The object of this treatise being to illustrate the extent, more than the origin, of the power of the Admiralty Court, exonerates the writer from any lengthened inquiry into the antiquity of its jurisdiction; but as much has been copied into our standard law-authorities from either books which were written at a time when the present was a subject of irrational jealousy and angry controversy, or from opinions which were conceived in prejudice, and brought forth in the warmth of violent disputations, some inquiry into the truth of the matter may not be entirely useless.

CHAP. I.

Blackstone says in the third volume of his Commentaries: "According to Sir Henry Spelman and Lambard, it was first of all erected by King Edward III." But as these were only the opinions of those distinguished antiquarians, and as they were expressed in such a manner as to leave them as much open to contradiction at the present time, as they were when either Blackstone copied or Spelman and Lambard originated them, it is necessary that we should observe the grounds, fairly stated as they are, upon which such opinions were formed. It is proposed to discuss their opinions first, not because they fix an origin to the Admiralty Jurisdiction prior than any other, but because they alone have felt themselves competent to fix an exact period when such jurisdiction originated. In both instances the reasons given are, that they find no mention of the Admiralty Jurisdiction before the time at which they fix it; and from the manner in which it is mentioned when they do find it, they infer that it then originated. First of Lambard: in the early part of the Archeion, in treating of "the beginning of courts of justice," he says: "concerning the *Admiralty*, I think that the decision of *marine* causes was not put out of the King's House, and committed to the charge of the Admiral, until the time of King Edward III., whereunto I am led partly by the consideration of the time of his reigne, which was much occupied with affaires beyond the sea, both by reason of the warres in *France*, and of the entercourse and trade of merchandise which then flourished, and partly for that I finde no mention of the *Admiralty* before the second yeere of the reigne of King *Richard II.*, who going about by a *statute* made in the 13 yeere after his comming to the crowne, to restraine the authority of that court, which had exceeded her knowne limits, doth take order that she doth meddle no further than she wonted to do in the time of his *Grand-*

father King Edward III., thereby reducing her *authority* (as I thinke) to the first originall." However much Lambard might have been "led thereunto," this will hardly be considered sufficient to warrant such a deduction, even where evidence to the contrary is absent; Quite as fair an inference is it, that the Admiralty Jurisdiction did not then originate, because if such were the fact, namely that it did then originate, in every probability it would have been mentioned in that statute.

Sir Henry Spelman appears to have paid great attention to the subject, having dedicated an entire treatise to it (called a discourse of the Admiral Jurisdiction), printed in the Reliquiæ Spelmannianæ*, and also a long article in his Glossary, title *Admiralius.* He relies upon the opinion expressed on several grounds. *First,* because the statute *de wrecco Maris* of 3 *Edw. I.* and that *de officio Coronatoris,* 4 Edw. I., in speaking of wreck, do not so much as once mention it.

Secondly, because Britton makes no mention of it.

And *thirdly,* he fixes it at the end of the reign of Edward III.: to use his own words. "For that by the 13th year of Richard II. it (viz. Admiralty Jurisdiction) was grown so much out of order, as a special law was made to reduce it to the fashion it had in the time of Edward III. (as to the original type) enacting that the admirals and their deputies should not meddle with anything done in the realm but *only* of things done upon the sea, as was duly used in the time of *K. Edw.* grandfather of the said *King Richard,* 13 *Rich.* 2. *cap.* 5. In which law the very worde *duly* doth in some sort by implication discover the beginning of the office to have been at that time, for that laws and offices are never after so duly executed as at their first beginning. It

* The edition quoted from is a folio of 1723, printed for D. Browne, W. Mears, &c., London.

CHAP. I.

seemeth, therefore, that King *Edw. III.* after the 27th of his reigne being laden very heavily with the wars of *France* and foreign affairs, and encumber'd also with marine causes, by reason of the great trade of merchandize then flourishing, somewhat to lighten the ship of his royal cares, delivered these businesses over unto the admiralls," &c. These are the grounds upon which he forms his opinion; now as to the *first*, viz. that the admiral's jurisdiction is not mentioned in the 3 of *Edw. I.* It is not very extraordinary that there should be no mention made in the statute of the jurisdiction of the Admiralty in reference to a subject over which it was not intended that the Admiralty Court should have authority, and which authority is therein expressly given to the law of the land. Had Spelman lived long enough he would have seen no mention of Admiralty Jurisdiction in a statute of the 12th of Anne, which was a continuation of the 3rd of Edw. 1.* *Secondly*, as to its not being mentioned in Britton, we return to Lambard, who, in speaking of some court not mentioned in Britton, which clearly existed at the time he wrote, says,† "And albeit that Britton, *whose purpose was only to set forth the courts whereof there was* COMMON USE,

* What will so much destroy the authority of Sir H. Spelman, at least in this matter, is, that in his whole discourse on the Admiralty Jurisdiction he has inferred so much from neither the Admiral nor his Court having been mentioned in the early statutes which relate to *wreck of the Sea;* as if he, or that Court had jurisdiction therein, at the time he wrote. Having been so incorrect, in his fact, the inference which he deduces from it necessarily dies with it. It is also remarkable, that in another part of the same treatise in which he endeavours to show that those subjects which are now within the Jurisdiction of the Admiralty Court, were then triable at Common Law, he has only produced the subject of *wreccum maris*, and has made every deduction from that circumstance; and, strange to say, there is in the same book, this candid avowal, "But I don't find how contracts and actions arising on the Maine Sea were then discussed."

† Page 52. of the Archeion; Edition of 1635, D. Frere, London.

hath not numbered it among the courts of that time, yet I doe verily believe that it came hither with the conquerour out of Normandy." There is but little, therefore, if anything in favour of his opinion by reason of its not finding a place in Britton's enumeration of the courts. As to the *third* ground, what has been said above at p. 3. respecting Lambard applies equally here, and it can be the more satisfactorily answered, when we can show some good reason for King Edward III. being mentioned in that statute, which was, as will be more fully stated below, namely that in the reign of Edward III. the Judges were then consulted "for the better *retaining and preserving** the authority of the English Admiralty in explaining and correcting the laws made for the maintenance of peace and the administration of justice to all nations and people navigating in the English seas."†

Having shown (I trust satisfactorily) that from the manner in which both Spelman and Lambard found the Admiralty Jurisdiction mentioned, they had not sufficient cause to infer that it then originated, it only remains for us to observe, if we can find any well-authenticated account of that jurisdiction mentioned as existing previous to such period, and then to dismiss both Lambard and Spelman without further apology for having taken so much liberty with their opinions.

We shall discover, on the contrary, that the origin of the jurisdiction exercised by the Admirals' Court is buried in an antiquity much more venerable than that which has been assigned to it by the authorities mentioned above; and in favour of such antiquity it is no slight circumstance, that before England had a fleet, viz. a navy so organised as to deserve the name, there

* These words clearly imply a pre-existence.

† See below, page 14.

CHAP. I.

appears to have been a great officer of state who was intrusted with the custody of the sea; such person being called, in those commissions which are preserved to us, the *custos maris*, and his charge was said to be that of *maritime England.** That this person was not necessarily the actual commander of a number of ships, but that he was that officer of state who presided generally over maritime affairs, is no unreasonable conjecture; the more so, as we shall be able to deduce much from authentic records which will force such conjecture into an almost certainty. All the commissions, or patents, from the king to his admirals, previous to the reign of King John, are lost†, so that we are unable to observe what were the kind of duties which belonged to this office. The duties of the admirals‡, who succeeded as well to this custody of the sea as to that of the fleet, appear to have been, not only to command ships in battle and to superintend the naval strength of the kingdom, but to administer justice in all causes arising on the seas. The latter duties are now, as heretofore, executed by the High Court of Admiralty, and are those which it is the object of the present work to illustrate; the former are now under

* *Richardus de Lucy* dicitur habere maritimam Angliæ. Pat. 8. Hen. 3. *Thomas de Moleton* capitaneus et custos maris, 48. Hen. 3.

† Seld. Mare cl. l. 2. c. xiv.

‡ Many angry disputations, and much learning has been uselessly expended on the question as to how the name Admiral came into this country; some deriving it from the Saxon *Aen mereal*, i. e. over all the sea; others from the language of the Moors (*Emir*;) others from the Greek Αλμυρος; others make it a mongrel, from the Arabian and Greek *Amira* and αλιος; some that we copied it from the French; Spelman thought it was brought direct from the Holy Land by Richard I. &c. However, the result of all these, and many other, arguments and etymological opinions, have brought the question so far, as fully to convince us how useless they were as a means of throwing any light upon the introduction of the office, and there appears to be no occasion to go so far for so little. It was, originally at least, a name more of dignity than of office.

the control of that department of the government called the Admiralty.

In order to authenticate what has been advanced respecting the admiral having entertained maritime causes at this early period, we must refer to the writings of Lord Coke, who has assigned to this maritime jurisdiction a most venerable antiquity; but the research of that great lawyer was insufficient to discover any precise period when the admiral was first intrusted with such authority. *Time out of minde* are the general words under which he shields himself. In his commentary upon Littleton, he says*, "And yet *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admirall, whose jurisdiction is verie antient, and long before the reigne of *Edward* the Third, as some have supposed, as may appear by the lawes of Oleron (so called for that they were made by king *Richard* the First when he was there) that there had been an admirall *time out of minde*, and by many other antient records is most manifeste."

But as his commentator or animadverter, the learned Prynne, has fixed a more certain period to this jurisdiction, and has given the records from which Coke has quoted or made these deductions, he is entitled to our attention first. He says†, "In my perusal of the *Black Book of the Admiralty* there reserved, (of as great authority with them as the *Black* and *Red Books* in the Court of Exchequer are there) p. 24. 27., I found an *ordinance* made at *Ipswich* in the reign of King Henry I. by the admirals of the north and west, and other lords and of DIVERS KINGS before that time, containing the manner of outlawing and banishing persons attainted of felony or trespass in the Admirals' Court; the former whereof is there recorded at large: by which it is apparent that there was an Admirals' Court, and pro-

* P. 260. b.

† Cap. 22. p. 106.

CHAP. I.

ceedings in it even in criminal and capital causes, relating to mariners and seamen (as well as in civil). In the reign of King *Henry* I. derived from our ancient Saxon kings *Alfred, Edgar, Ethelred,* and others who had the dominion of the *British Ocean,* which continued in use till the reign of King *Richard* I."

The next mention of any kind of Admiralty Jurisdiction is a charter of Richard I. addressed to the admirals of the fleet which was fitted out to the Holy Land.* The making of the laws of Oleron are then relied on, and several ordinances made by that king †, by King John ‡, Henry III., and Edward I., at Hastings, not only for the government of the British navy, but ordinances concerning merchants and mariners, which the learned Prynne states, he had transcribed from the Black Book of the Admiralty. The one which more especially relates to the subject now under discussion is the following, which is stated to have been made at Hastings by Edward I. in the following words, "chescun contract fait enter merchant et merchant, ou merchant ou mariner oustre le mere, ou dans le flode marke, seron trie devant l'admiral et nenient alibi; per le ordinance de dit Roy *Edward* et ses seigneurs."

There is less reason to doubt the authenticity of these regulations, when we observe in several of the oldest

* Hovenden, p. 666. The charter is printed at length in Prynne, 106.

† An ordinance of Richard I. is also quoted by Prynne as extracted from the Black Book of Admiralty made at Grimesby to the effect; that if the admiral, by the king's command, arrested any ships for the king's service, and he or his lieutenant retourned and certified the arrest in Chancery, the master or owner could not be admitted to plead against the return, and if the ship so arrested break the arrest, and the master or owner be convicted thereof *devant l'admiral*, by the oath of twelve men, the ship shall be confiscated.

‡ In one of those ordinances King John appears to have recognised the laws of Oleron.

law-books confirmations of them. The following case is reported in several places*: "A replevin was brought for the taking of a ship in the coast of Scarborow in the sea, and for carrying the same from thence into the county of H. Matford, the plaintiff counteth of a taking in the coast of Scarborow, which is neither town nor place out of which a jury may be taken, for that the coast is four miles long, and also of a thing done in the sea, this court hath no conusance, for certain judgment is given thereof to mariners. *Berry*, Chief Justice of the common pleas; The king willeth, that the peace be as well kept on the sea, as on the land, and we find that you are come hither by due processe, and therefore ruled him to answer. Out of which foure things are to be observed. First that it is called the sea which is not within any county from whence a jury may come. Secondly that the sea, (being not within any county) is not within the jurisdiction of the court of Common Pleas, but belongs to the Admiral Jurisdiction. Thirdly, that when the ship came within the river, then it is confessed to be within the county of Northumberland. Lastly, that when a taking is partly on the sea, and partly in a river, the common law shall have jurisdiction."

Another case of the eighth year of King Edward the Second must be mentioned as one, of the many, distinctly recognising the ordinances given above: it is thus reported: "It is no part of the sea where one may see what is done of the one part of the water, and of the other, as to see from one land to the other, that the coroner shall exercise his office in this case, and of this the country may have knowledge; whereby it appeareth

* Fitzherbert's Abridgement, in temps. E. 1. Tit. Avowry. p. 192. In Coke's 4th Institute, p. 140., this case is also cited, not for the purpose of showing the antiquity of the Admiralty Jurisdiction, but that such jurisdiction was confined to things done upon the seas.

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that things done there are triable by the country (that is, by jury), and, consequently, not in the Admirall Court."

These ordinances, although they were not referred to in the judgment of the Court, were cited by counsel in a case in Queen Elizabeth's reign *, and the following inference was then made from them: "According to those ordinances, the admirals had used their authority in the aforesaid places until this time, as well in things done beyond the sea, and on the sea, as between high and low water mark."

But the instrument which has been so frequently † relied on, not so much for the purpose of proving the antiquity of the Admiralty Court, as of proving the right of England to the sovereignty of the seas, is one entitled "*De superioritate maris Angliæ et jure officii Admirallatus in eodem.*" There is no date to this document; but it has been remarked by a learned historian ‡ that "it is proved by internal evidence, that if the proceeding did actually take place §, it must have been after the treaty which was made with France in May 1303, and before the death of King Edward the First, in November 1307," and not, as Lord Coke has supposed, in or about the twenty-second year of Edward I. [1293-94]. The original record is in Norman French, and has been thus translated by Selden: —

"To you, our lords auditors deputed by the kings of England and France to redress the wrongs done to the people of their kingdoms, and of other territories subject

* Sir John Constable's case, p. 89. Anderson's Reports.

† Selden, Lord Coke, Prynne, &c.

‡ Sir H. Nicolas. See his recent work, "The History of the Royal Navy."

§ See also the same author's valuable remark to the effect that the probability is, that this instrument was merely the draught of an agreement or treaty, of the completion of which there is no evidence.

to their dominion by sea and land in time of peace and truce, the procurators of the prelates, nobles, and of the admiral of the sea of England, and of the commonalities of cities and towns, and of the merchants, mariners, messengers, inhabitant strangers, and all others belonging to the said realm of England, and the other territories subject to the dominion of the said king of England, and of others under the jurisdiction of the same, as also divers other nations, inhabitants of the sea-coasts of Genoa, Catalonia, Spain, Almaigne, Zealand, Holland, Friesland, Denmark, and Norway, and of divers other places of the empire, do declare, that whereas the kings of England, by right of the said kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable possession of the sovereign lordship of the sea of England, and of the isles within the same, with power of making and establishing laws, statutes, and prohibitions of arms and of ships otherwise furnished than merchant men used to be, and of taking surety, and affording safeguard in all cases where need shall require, and of ordering all other things necessary for the maintaining of peace, right, and equity among all manner of people as well of other dominions as their own, passing through the said seas, and the sovereign guard thereof, and also of taking all manner of cognizance in causes, and of doing right and justice to high and low, according to the said laws, statutes, ordinances, and prohibitions, and all other things which may appertain to the exercises of sovereign jurisdiction in the places aforsaid: *And whereas A. de B., deputed Admiral of the said sea by the King of England, and all other admirals appointed by the said King of England, and his ancestors heretofore Kings of England, have been in peaceable possession of the said sovereign guard, with power of jurisdiction and other, the aforesaid appurtenances, (except in case of appeal, and complaint*

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made of them to their sovereigns the Kings of England, in default of justice or for evil judgment,) and especially of making prohibitions, doing justice, and taking surety of the peace of all manner of people using arms in the said sea, or carrying ships otherwise furnished and set forth than merchant men used to be, and in all other points where a man may have reasonable cause to suspect them of robbery or other misdemeanours: And whereas the masters of the ships of the said kingdom of England in the absence of the said admiral, have been in peaceable possession of taking cognizance, and judging of all actions done in the said sea between all manner of people, according to the laws, statutes, prohibitions and customs. And whereas in the first article of the league lately made between the said kings, in the treaty upon the last peace at Paris, there are comprised the words here following in a schedule annexed to these presents:

"First, it is concluded and accorded between us, and the agents and procurators aforesaid, in the names of the said kings, that the said kings shall, from this time forward, become to each other good, true, and faithful friends, and be aiding to one another against all men (saving the Church of Rome), in such manner that if any one or more, whosoever they be, shall intend to disturb, hinder, or molest the said kings in the franchises, liberties, privileges, rights, and customs of them and their kingdoms, they shall be good and faithful friends to each other, and aiding against all men living, and ready to die to defend, keep and maintain, the franchises, liberties, privileges, rights, and customs aforesaid, except on behalf of the said King of England, John Duke of Brabant, in Brabant, and his heirs descending from him and the daughter of the King of England, and except on behalf of our Lord the said king of France, the excellent prince, Monsieur Albert, king of Almaigne, and Monsieur John, Earl of Hainault, in Hainault; and

that the one shall not be of counsel, nor aiding where the other may lose life, member, estate, or honour."

"Monsieur Reyner Grimbald, master of the navy of the said King of France, who calls himself admiral of the said sea, being deputed by his aforesaid lord in his war against the Flemings, did, after the said league made and confirmed, against the tenor and obligations of the said league, and the intent of them that made it, wrongfully assume and exercise the office of Admiralty in the said sea of England, above the space of a year, by commission of the said King of France, taking the people and merchants of the kingdom of England, and of other places, passing through the said sea with their goods, and committed them so taken to the prisons of his said lord the King of France, and delivered their goods and merchandises to the receivers of the said King of France, by him deputed in the ports of his said kingdom, as forfeited and due unto him, to remain at his judgment and award. And the taking and detaining of the said people, with their said goods, as also his said judgment and award for the forfeiture and acquest of them, he hath justified before you, lords auditors, in writing, by virtue of the authority of his said commission of Admiralty aforesaid, by him usurped after this manner, and during a prohibition or restraint generally made and proclaimed by the King of England, in right of his dominion (according to the tenor of the third article of the league aforesaid, which contains the words above written), requiring that he may thereupon be acquitted and discharged of the same, to the great damage and prejudice of the said King of England, and of the prelates, and nobles, and others above mentioned.

"Wherefore the said procurators, in the names of their said lords, do pray your lordships auditors, that you would cause due and speedy deliverance of the said people with their goods and merchandises so taken

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and detained, to be made to the admiral of the said King of England, to whom the cognizance of the same of right appertaineth, as is before expressed, so that, without disturbance from you or any other, he may take cognizance thereof and do what belongs to his office aforesaid, and the said Monsieur Reyner be condemned and constrained to make satisfaction for all the said damages, so far forth as he shall be able, and, in his default, his said lord, the King of France, by whom he was deputed to the said office; and that, after satisfaction given for the said damages, the said Monsieur Reyner may be so duly punished for the violation of the said league, that his punishment may be an example to others in time to come."

A record of the twelfth year of the reign of Edward III., the authenticity of which has never been questioned, not only confirms that which we have endeavoured to infer from this previous one *de superioritate maris*, but also affords us a satisfactory reason for the name of Edward III. being mentioned in the statute of Richard II., from which Spelman and Lambard have made an unwarranted inference. It is described as a roll, relating to the articles on which the justices of our lord the king were to be consulted, and as stated to be, to the end that the form of proceeding formerly instituted by Edward I. and his counsel at the request of his subjects, might be resumed and continued for the better retaining and preserving the ancient superiority of the seas of England and the authority of the English admiralty in explaining and correcting the laws and statutes made by his progenitors the kings of *England* for the maintenance of peace and the administration of justice to all nations and people navigating in the English seas, &c. *

* This record is printed in full in Coke's 4th Institute, p. 144. It is entitled "*De articulis super quibus Justitiarii domini regis sunt*

No other evidence than the preceding remains as to the fact of the Admiralty Jurisdiction having existed before the time of Edward III., and to that fact it appears to be conclusive. But, from the indirect manner in which the constitution of the Admiralty Court is mentioned in all these documents, the greatest obscurity remains as to when the admiral first received his judicial authority from the crown: to say that such authority has existed "time out of mind" is certainly the shortest method, and perhaps the one less liable to be contradicted, but certainly not the one which will be the most satisfactory to an inquiring reader. From the laws of Oleron it appears from the recent researches of scientific men*, that we are not entitled to infer quite so much antiquity to the judicial power of the Admiralty as has been done by Lord Coke; for although it is clear that these laws were afterwards sanctioned and confirmed by royal authority, the assertion that they were compiled by the direction of, or confirmed by, King Richard I. on his return from the Holy Land, appears to be not quite consistent with historic truth. The truth of the matter appears to be, that these laws

consulendi de anno regni regis E. III. 12." *Item ad finem quod resumatur et continuatur ad subditorum prosecutionem forma procedendi quondam ordinata et inchoata per* * *avum domini nostri regis et ejus consilium ad retinendum et conservandum antiquam superioritatem maris Angliæ, et nos officii admiralitatis in eodem quoad corrigendum interpretandum, declarandum, et conservandum leges et statuta per ejus antecessores Angliæ reges dudum ordinata ad conservandum pacem et justitiam inter omnes gentes nationis cujuscunque per mare Angliæ transeuntes et ad cognoscendum super omnibus in contrarium attemptatis in eodem, et ad puniendum delinquentes et damna passis satisfaciendum, quæ quidem leges et statuta per dominum Richardum quondam regem Angliæ in reditu suo à terra sancta correcta fuerunt, interpretata et in insula Oleron publicata et nominata in Gallica lingua La Ley Olyron.*

* More particularly M. Pardessus.

* Edward I., grandfather of Edward III.

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were compiled by the then industrious and seafaring people who navigated in, and about, the Bay of Biscay: but it is clear that, at that time, the rules contained in this compilation were observed on the northern and western coasts of France, and may have been received therefore to a certain extent in England also at that time. By an ordinance of King John, at Hastings, these laws appear to have been recognised, and in the reign of Edward I. it is clear that they were the rules which were adopted by the maritime courts for administration of justice in all sea causes. At the same time it would appear to be almost improbable that before the reign of Edward I., there existed any regularly organised tribunal for the determination of these causes: everything tends to show, that although there appears to have been no other court intrusted with that authority, and although there are occasional glimpses of judicial power existing in the sea-officers of the king, such a tribunal was comparatively unknown till the reign of Edward I. That this Monarch (our English Justinian as he has been frequently called) had paid as much attention to the administration of justice to all persons navigating in the high seas, as to the other more important branches of our jurisprudence, is apparent from the record quoted above.* It is no unfair presumption, that we are indebted to that sovereign for the better establishing the jurisdiction of his admirals, and perhaps for the organisation of the first Admiralty Court which deserved the name. Be that as it may, however, it is a fact beyond contradiction, that to no other person was this authority granted; and that so soon as such a tribunal was required, so soon as this country began to take advantage of its insular position, so soon as its attention was called to navigation, and commercial intercourse with other

* Rot. E. 3. 12.

countries, just so soon did the sovereign delegate certain officers to defend such commerce, and to administer justice to those persons who were engaged in it; and thus doubtless the establishment of this court was as gradual as was the necessity to supply which it was created, and its origin has, by the same means, led to so much controversy. To attempt to discover its actual and precise origin would be as vain a task, as to fix such an origin from the insufficient records which are left to us would be a presumptuous one.

It has been mentioned before that the jurisdiction of the Admiralty Court was the subject of much irrational jealousy and strong controversy between it and the superior courts, and whilst treating of the antiquity of the former court, it is difficult to omit some mention of it, though it occurred in a comparatively recent period. It was in the sixteenth and seventeenth centuries that the Admiralty Court suffered from the violence of this jealousy. Jealousy is perhaps a mild word to apply to the passion with which the superior courts took up this question, for there appears to have been more greediness than emulation at the bottom of it.* It is to be regretted, that to no less illustrious personage than Lord Coke is to be ascribed the origin of this jealousy, and that being the case, it is not wonderful that others should, from subserviency to the opinion of so great a man, have followed in the same track, or even have gone beyond it, *imitatores servum pecus!*†

* It was, says the learned Prynne, "for more jurisdiction, *for gain*, not for the public good, but that one jurisdiction might swallow up the other."

† This jealousy of Lord Coke towards the Admiralty Court, has been the subject of frequent and severe comment, not only in the words of the learned Prynne, nor in those of the learned civilians

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However, matters raged so high that a war was declared between the two courts; prohibitions were hurled from Westminster, and without much order, serving therefore, more to irritate than to subdue the Admiralty Court, which, though powerless and without the means of attack, obstinately held out for its ancient and time-honoured privileges. Of the many fields that were fought upon, the principal one was this: by a very early statute relating to the Admiralty Jurisdiction it was enacted, that that court should have no authority to try causes arising within the bodies of counties, but only of those arising upon the high seas. The superior courts of law declared, that according to this statute the Admiralty Court was expressly denied the power of determining any cause which arose in any foreign realm, or part beyond the high seas, and accordingly in every case where the plaintiff in the Admiralty Court alleged the cause of the action to have arisen *in any foreign country within the jurisdiction of the High Court of Admiralty*, the courts at Westminster sent down a prohibition, to prevent the Admiralty Court from entertaining the question, without reference to its nature, although they could only drag the suit into their own courts by the most awkward fiction of law*, thus

who were affected by it, but by Story, J. sitting in Admiralty, in the American Courts. See also Buller, J. in 3 Term. Rep. 348. "I think that that part (viz. relative to the Admiralty Jurisdiction) of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."

* "A new strange poetical fiction (says Prynne) against this principle in law, *Fictio non habet locum in factis*, false, contrary, impossible, fraudulent, illegal suggestion, prejudicial to merchants and mariners, especially foreigners, as well as to the Admiralty." This fiction appears to be still observed in the pleadings at common law. See Simmonds and Loder *v.* Hodgson, reported in 3 B. & Adol. 50. 3 M. & P. 385. 6 Bing. 114.

illustrated by Lord Coke, in his Commentary upon Littleton: "An obligation made beyond the seas may be sued here in England, in what place the plaintiff will. What then if it beare date at *Bourdeaux* in *France*, where shall it be sued? And answer is made, that it may be alleaged to be made *in quodam loco vocat Bourdeaux* in *France*, in *Islington*, in the county of *Middlesex*, and there it shall be tried, for whether there be such a place in *Islington* or no, is not traversable in that case. These points are necessary to be knowne in respect of the variety of opinions in our books."

Blackstone has also defended this fiction, although he appears to regard it, for the purpose only of giving *concurrent* jurisdiction to the courts of common law, where, indeed, it appears justifiable enough, for it is only when it is used as a means of obtaining *exclusive* jurisdiction over foreign contracts, and prohibiting from entertaining such questions, a court which required no such fabulous aid, that absurdity attaches to the fiction. These are the words of the learned commentator: "And also, as the courts of common law have obtained a concurrent jurisdiction with the Court of Chivalry with regard to foreign contracts, by supposing them made in England; so, it is no uncommon thing for a plaintiff to feign that a contract really made at sea was made at the Royal Exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall. This the civilians exclaim against loudly, as inequitable and absurd; and Sir Thomas Ridley hath very gravely proved it to be impossible for the ship in which such cause of action arises to be really at the Royal Exchange in Cornhill. But our lawyers justify this fiction, by alleging (as before) that the locality of such contracts is not at all essential to the merits of them; and that learned civilian himself seems to have forgotten how much such fictions are

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adopted and encouraged in the Roman law, that a son killed in battle is supposed to live for ever for the benefit of his parents; and that, by the fiction of *postliminium* and the *lex Cornelia*, captives when freed from bondage, were held to have never been prisoners, and such as died in captivity were supposed to have died in their own country."

It would not be difficult, were it necessary to provoke a further comparison between these fictions from the Roman law, quoted by the learned commentator, and that which is now under discussion, not much to the credit of the latter: respecting those of the Roman law, there was at least some purpose which justified their adoption; the end justified the means; and if the other be viewed as a means of *prohibiting* a court of justice from entertaining a question which fairly belonged to it, it is not quite so recommendable, and it was in this view, doubtless, that the wounded civilians complained of it. They endeavoured in vain to convince the higher powers that their jurisdiction was raised above the temptation of encroachment or conquest, that, without wishing to enlarge the limits of their courts, they were only actuated with a love of justice, and respect for their native dignities; but their outcries were little listened to by their rapacious invaders. The practitioners in Doctors' Commons were not the only sufferers from this useless conflict; the merchants, the people, called loudly for a cessation of hostilities: the crown was appealed to. It may not be uninteresting to the reader to observe the nature of the application and the result. On the eleventh of February, in the eighth year of King James I., the judges of the King's Bench and Admiralty being present, the following was read before the king, and was then alleged to have been an agreement, made in the year 1575, between the judges: —

THE JUDGES' AGREEMENT.

The 7th *of May*, 1575.

It is agreed by the Lord Chief Justice *and his* colleagues, *that after sentence given by the* delegates, no prohibition shall be granted; *and yet if there be no sentence, if a* prohibition be not sued within the next tearm following sentence in the Admiral Court, *or within two tearms next after, at the farthest,* no prohibition shall pass to the delegates.

They have agreed, that the Judge of the Admiralty and the party defendant shall have counsil in court, and plead the stay, if there may appear evident cause.

This is agreed upon by the said Lord Chief Justice and his collegues.

The chief point now in question.

This is likewise agreed upon, for things to be performed either upon, or beyond the seas, though the charter-partie be made upon the land, by the statute of 32 *H. VIII. c.* 14.

The Request of the Judge *of the* Admiraltie *to the* Lord Chief Justice *of her* Majesties Bench *and his* Collegues.

That after judgment or sentence definitive given in the Court of the *Admiralty* in any cause and *appeal* made from the same to the *High Court of Chancery;* that it may please them to forbear *granting of any writ of prohibition,* either to the judge of the said *court,* or to Her *Majesties delegates,* at the suit of him by whom such *appeal* shall be made, seeing by choyce of remedie that way, in reason he ought to be contented therewith, and not to be relieved any other way.

Also, that *prohibitions* be not granted hereafter upon *bare suggestions* or *surmises,* without *summary examination and proof made thereof,* wherein it may be lawful to the Judge of the Admiralty and the party defendant, by the favour of the *court,* to have *counsel, and to plead for the stay thereof, if there shall appear cause.*

That the Judge of the Admiralty, according to such ancient order as hath been taken 2 *Ed. I.* by the king and his council, and according to the letters patents of the Lord Admiral for the time being, and allowed of by other kings of this land ever since, and by custome, time out of memory of man, may have and enjoy the cognition of all contracts, and other things arising as well beyond as upon the sea, without any let, or prohibition.

That the said Judge may have and enjoy the knowledge and breach of charter-parties made between masters of ships and merchants, for voyages to be made to the parts beyond the seas, and to be performed upon, and beyond the sea, according as it hath been accustumed, time out of mind, and according to the good meaning of the statute of 32 *H. VIII. c.* 14., though the same charter-parties happen to be made within the Roialme.

If any writ of this nature be directed in the causes before specified, they are content to return the bodies again to the Lord Admirall's Goal, upon certificate made of the cause to be such, or if it be for contempt, or disobedience done to the court in any such cause.

That writs of corpus cum causa *be not directed to the said Judge* in causes of the nature aforesaid; *and if any happen to be directed,* that it may please them to accept the return thereof, with the cause, and not the body, *as it hath always been accustumed.*

This agreement, it appears, continued till Lord Coke slighted it, as a *supposed agreement,* because not subscribed by any of the judges*, and prohibitions were granted by him to the Admiralty, as Prynne says, "more than ever before." However, in the ninth year of King Charles I. an. 1632, the lord admiral and Sir Henry Martyn, then judge of the Admiralty, made 'great complaint' to the king and the lords of his council, "before whom," continues Prynne, "the matters in difference between the *Admiralty* and *Judges* were several times heard and debated at large; and at last these ensuing articles were drawn up, read, agreed, and resolved at the council-board by the King himself, and no lesse than twenty-three of his council, (two of them the *Lord Keeper Coventry* and *Lord Privy Seal Mountague,* eminent lawyers) yea, ratified by the subscriptions of all the Judges, being twelve in number, very eminent learned lawyers, and of the grand lawyer, Mr. *William Noy,* then King's attorney, as well as of Sir *Henry Martyn,* then Judge of the Admiralty, entered in the *Council Table Register of causes,* and the original thereof kept

* "The supposed agreement mentioned in this article hath not, as yet, been delivered unto us, but having heard the same read over before his Majesty out of a paper not subscribed with the hand of any Judge, we answer that for so much thereof as differeth from these answers, it is against the laws and statutes of this realm; and therefore the judges of the King's Bench never assented thereunto, as is pretended, neither doth the phrase thereof agree with the terms of the laws of the realm." Coke's 4th Institutes, 136.

by his Majesty's command in the *council chest* in form following: —

At *Whitehall* 18th of *February* 1632.

Present

The King's Most Excellent Majesty.

Lord Keeper,	Lord V. Wimbleton,
Lord Archb. of York,	Lord Vis. Wentworth,
Lord Treasurer,	Lord V. Faukland,
Lord Privy Sal,	Lord Bishop of London,
Earl Marshall,	Lord Cottington,
Lord Chamberlain,	Lord Newburgh,
Earl of Dorset,	Mr. Treasurer,
Earl of Carlisle,	Mr. Comptroller,
Earl of Holland,	Mr. Vice Chamberlain,
Earl of Darby,	Mr. Secretary Coke,
Lord Chanc. of Scotland,	Mr. Secretary Windebanke.
Earl Morton,	

"This day his Majesty being present in council, the articles and propositions following for the accommodating and settling of the differences concerning prohibitions arising between his Majesty's Courts of *Westminster* and his Court of Admiralty, were fully debated, and resolved by the Board. And were then likewise upon reading the same as well before the Judges of his Highnesse said Courts at *Westminster*, as before the Judge of his said Court of Admiralty, and his Attorney-general, agreed unto and subsigned by them all in his Majesty's presence, and the transcript thereof ordered to be entered into the register of Council Causes and the original to remain in the Councill chest.

"1. If suit shall be commenced in the Court of Admiralty upon contracts made, or other things personally done BEYOND THE SEAS, or upon the sea, no prohibition is to be awarded.

"2. If suit before the admiral for freight, or mariners' wages, or for the breach of charter-parties for voyages to be made beyond the sea, though the charter-parties

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happen to be made within the realm, and although the money be payable within the realm, so as the penalty be not demanded, a prohibition is not to be granted; *but if suits be for the penalty, or if question be made whether the charter-partie were made, or not; or whether the plaintiff did release or otherwise discharge the same within the realme*, that is to be tried in the king's Courts at *Westminster*, and not in the king's Court of *Admiralty*, so that first it be denied upon oath, that a charter-partie was made, or a denial upon oath tendred.

"3. If suit shall be in the Court of Admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm.

"4. Likewise the admiral may enquire of, and redresse all annoyances and obstructions in all navigable rivers, beneath the first bridges, that are any impediments to navigation, or passage to, and from the sea, and also try personal contracts and injuries done there, which concern navigation upon the sea, and no prohibition is to be granted in such cases.

"5. If any be imprisoned, and upon *Habeas Corpus*, if any of these be the cause of imprisonment, and that be so certified, the partie shall be remanded.

(Signed,)

Thomas Richardson *,	William Jones,	Robert Barkley,
Ro. Heath †,	George Croke,	Fran. Crawley,
Humphry Davenport ‡,	Tho. Trevor,	Henry Marten,
John Denham,	Geo. Vernon,	William Noye.
Rich. Hutton,	James Weston,	

Ex. T. Meautys."

* Ch. Justice of the King's Bench.

† Ch. Justice of the Common Pleas. ‡ Ch. Baron.

"These resolutions," says Prynne, "(printed in Judge *Croke's Reports* without the names of the king, lords of the council, or judges) thus made, assented to, ratified after long debate and deliberation in so solemn a manner by the *king himself, all the lords of his council, and so unanimously subscribed by all his learned judges* (who would part with no branches of his *Majestie's* or his *common law courts' jurisdiction*, to advance the *Admiraltie's*, against their *oathes, trusts*, and of his *attorney*, Mr. *Noy*, a great professor and pillar of the *common law*) entered in the *register* of *council causes*, and the *original* then subscribed left to remain to posterity in the *council chest*, and never since complained against in parliament (no, not in the case of *ship-money*, nor in the learned debates thereof in the houses, nor *act* against it), will doubtlesse overbalance all the presidents of prohibitions produced by the author *, or printed in modern reports, being granted upon sudden motions without solemn argument, to restrain the admiral's jurisdiction of contracts, and other things concerning merchants or mariners, done beyond the seas, and other particulars expressed in these articles and prohibitions for accommodating and settling the differences between these courts' jurisdictions concerning *prohibitions*."

This time the civilians, well knowing what treacherous combatants they had to deal with, took care, as we have seen, that every formality should be observed, and although Lord Coke does not appear to have been present (for he retired from public life in 1629, and died in 1633, a year after these resolutions were made), they were signed and certified with every form: however, although they were printed, as has been observed by Prynne, in Croke's reports, in the later editions they have been left out, seemingly *ex industria*, but they are

* Lord Coke.

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also set forth by Zouch in his work on the Admiralty Jurisdiction, and in many other places. It has been seen that Lord Coke, in his observations on the agreement of 1575, had objected to it on the ground that, though it was read over in the presence of his Majesty, still, that they never assented thereto, and that it was not signed by any judge. This objection could not apply to these resolutions*; but as this opinion of Lord Coke had been so firmly expressed in his fourth institute, and as this flame of jealousy which he had kindled was far from extinguished, objections too numerous to be here mentioned were not wanting to destroy their authority, and everything was done on the part of the superior courts to forget them.

Although at the Restoration the merchants petitioned for a re-observance of these rules of 1632, they appear to have been as little regarded as those of 1575; the civilians, tired of the struggle, appear to have desired a peace, however disadvantageous, to war, however justly it might have been carried on, and their arguments, though moderated by a fair spirit, could ill suffice to resist the violent opinions first expressed by Lord Coke, and afterwards supported by others with more subserviency than reason; and thus there is to be found in all our great text-books which were produced about that period, more confusion, more negligent disorder, relating to the Admiralty Court than, perhaps, to any other point. And although by this means so much of the ancient authority of the Admiralty Court has been rendered nugatory, in this nineteenth century that court may look back with pride, and observe how well it has survived the conflict, how the arguments which were put with such force by the learned civilians† in the

* See Browne's view of Admiralty, p. 78.

† By Dr. Dunn, Sir Henry Martyn, Sir Leoline Jenkins, &c. "It is apparent," observed the learned Zouch in his treatise called

sixteenth and seventeenth centuries appear at last to be listened to; for now, as will be seen in a subsequent part of this treatise, the rule of *locality* to which it was attempted to confine the jurisdiction of the Admiralty, has almost entirely, but not quite, given way to the more rational one of the *subject matter** to be adjudicated upon. It is not necessary to mention here, for that will be discovered in the subsequent parts of this treatise, how cautious the Admiralty Court has been for many years, and is now, lest it should exceed the limits which the legislature and the superior courts of law have assigned to it. To the illustration of these limits the following pages are devoted.

An ordinance of Richard I. has been quoted in a preceding part of this chapter†, by which it appears that certain certificates from the Admiralty were returnable into the Court of Chancery, and that such return was conclusive of the matters therein certified. It also appears clear that the Court of Chancery in ancient times exercised, concurrently with the Admiralty Court, a jurisdiction in respect of depredations on the high seas. "I observed," said Lord Nottingham‡, "that this cause was properly in Chancery upon many accounts, not only as it was a *scire facias* to repeal letters patent, but, as it was a cause of state; and likewise, as it was a

The Admiralty Jurisdiction asserted, "that it is not the place only, but the nature of the case happening within such a place that makes the jurisdiction; and therefore if a contract of marriage or a testament, be made at sea, the admiral claims no conusance thereof, which he might do, if the place alone were sufficient to give the jurisdiction."

* More particularly by the stat. 3 & 4 Vict. c. 65.

† See above, p. 8. in note.

‡ Rex v. Carew, 3 Swanston, 670.

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marine cause, and did concern depredations on the sea, in which cases the Chancery, as well as the Admiralty hath a clear jurisdiction; and this appears by what was said in Peter Blad's case (26 Car. II. 1678), and by many records and precedents cited in my parliament MSS., tit. Admiralty, and tit. Chancery, and is most expressly so settled and enacted in a statute not printed, viz. 31 Hen. VI." But this jurisdiction of the Court of Chancery is now, it is hardly necessary to say, obsolete.*

* See Spence's Equitable Jurisdiction of the Court of Chancery.

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GENERAL PART.

A GENERAL principle upon which the jurisdiction of the Admiralty, as at present exercised, may be determined, cannot be laid down. But its jurisdiction may be said to rest generally on the following considerations: first, the nature of the property to be adjudicated upon; secondly, the question to be decided; thirdly, the origin of the cause; and fourthly, the locality; and these must be *of the sea* to give the Admiralty a jurisdiction. But as the several questions or causes which belong to its jurisdiction are subject, in some instances, to one of these considerations as the point by which the jurisdiction may be determined, and in other instances to all, no more precise rule can be given with safety. It may be observed as a general rule, but bearing in mind that it is, perhaps, more liable to exceptions than general rules usually are, that in all cases of contract or injury of a maritime nature for the performance or reparation of which a ship, and its freight, &c., are liable, the Admiralty Court can by the exercise of its authority over such subject, afford a prompt and direct relief—secure to the plaintiff, for the proceeding is against the ship itself, which is, as it were, *brought into court,* and adjudicated upon; a relief without hardship or inconvenience to the defendant, for the ship can be as immediately released upon sufficient bail being given in its stead. In some way or another there is usually enough before the Admiralty Court to *answer the action,* for the foundation of its jurisdiction has frequently been stated to be

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upon, and the remedy enforced by it is, usually, against the property.*

But without further generalizing upon this subject, it is conceived to be more in accordance with the practical purpose of this work to proceed at once to the different subjects over which the Admiralty has jurisdiction, and there the reader may discover for himself the principles upon which such jurisdiction is retained under the several subjects as they are brought to his notice, and thus at least a useless repetition will be obviated. The subjects over which the Court of Admiralty has jurisdiction may be divided into causes of

1. Possession.
2. Bottomry; and therein of causes of action for repairs, necessaries, &c.
3. Wages.
4. Damage.
5. Salvage, towage, &c.

And lastly will be discussed the condemnation of Admiralty Droits, &c., and some of the more general powers of that court, as well those now in force as those which are obsolete; such of the appellate jurisdiction of that court as has not been removed, &c.

But before leaving this general part, it should be observed that the jurisdiction exercised by the Admiralty Court is of a twofold nature; in fact, the style of the court is changed in reference to such nature respectively, the one being the court in which all controversies relating to the maritime contracts, injuries, services, &c., above mentioned, are decided, and called the *Instance* Court: the other, in which cases of

* Although in many instances it is necessary that a suit should be instituted against a party personally in the Admiralty, the reasons why such a course of proceeding is seldom resorted to is obvious. See the *Volant*, 1 W. Robinson's Admiralty Reports, 383.

disputed capture, and seizure of a maritime nature, are determined, and called the *Prize* Court: many of the subjects which are cognizable in the Instance Court can also be determined in the other courts at Westminster, &c., there being, to some extent, a concurrent jurisdiction; but as regards the Prize Court, it has exclusive jurisdiction, the question of prize or no prize being alone determinable there. It is proposed in the present work to keep these two subjects perfectly distinct; and inasmuch as (at least in these times of peace) the Instance deserves more consideration than the Prize Court, we shall commence with the former, and treat of its jurisdiction under the several heads above given.

It should be further observed in this place that the jurisdiction exercised by the Admiralty Court is an equitable as well as a legal jurisdiction; and whether, therefore, the relief claimed from the court is either at law or in equity, a claimant is equally entitled to the authority of the court in such behalf; and if a court of equity could relieve and a court of law could not, it would be the duty of the Court of Admiralty to exercise its equitable jurisdiction.* "This Court," said Lord Stowell, "certainly does not claim the character of a court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice." † But to the expression, that the jurisdiction of the Admiralty Court is equitable, must be added the following qualification, extracted from a very recent case before the Judicial Committee of the Privy Council: "It is true that, in the discussion of cases properly within the jurisdiction

* See the *Harriette*, 1 W. Robinson's Admiralty Reports, 182. "The Court of Admiralty exercises a wide equitable jurisdiction." Per Cur. Jacob, 4 Robinson's Admiralty Reports, 250.

† *Juliana*. 2 Dodson's Admiralty Reports.

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of the High Court of Admiralty, equitable considerations ought to have their weight; but it does not thence follow that the Court of Admiralty has jurisdiction to do all that the courts of equity may do in suits instituted by persons suing either for themselves or on behalf of themselves and others, for the administration of assets or the distribution of a common fund, in which several persons are interested, or upon which they have claims." *

* Per Lord Langdale, in the *Saracen*, 11 Jurist. This case will be more minutely mentioned in that part of this treatise relating to Damage. *Vide infra.*

CHAP. III.

OF CAUSES OF POSSESSION.

THE encouragement of navigation and the property and employment of ships have been so much the favourite objects of the laws and customs of this country that such property has been distinguished from other personal property in this important particular; namely, that where such property is held (as it usually is) among part-owners who cannot agree respecting the employments of their property, the Admiralty Court has a power of interference in their disputes, and by forcing them to a common consent for their common benefit, and for the benefit of the public, this species of property can generally be enjoyed by them to the advantage of all.* Therefore upon any probable design, that Court

* The following beautiful remark, with regard to ships as distinguished from other personal property, is from the pen of Lord Tenterden :—"A personal chattel, vested in several distinct proprietors, cannot possibly be enjoyed advantageously by all, without a common consent and agreement among them: to regulate their enjoyment in case of disagreement is one of the hardest tasks of legislation, and it is not without wisdom that the law of England in general declines to interfere in their disputes, leaving it to themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or perish by their dissension; as the best method of forcing them to a common consent, for their common benefit. But of ships 'which are built to plough the sea, and not to lie by the *wall*,' commercial nations consider the actual employment as a matter not merely of private advantage to their owners, but of public benefit to the state, and therefore have laid down certain positive rules in order to favour this employment and to prevent the obstinacy of some of the part-owners from condemning the ship to rot in idleness." — Abbott's Shipping, 98.

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will give the major part of the owners power to freight out their vessel to sea, if even the minority dissent. Although the exercise of the Admiralty Jurisdiction in disputes among part-owners of ships was doubted in earlier times by the Courts at Westminster as an undue assumption of authority, these doubts were more the offspring of jealousy than of reason, and no direct decision on the point against such authority is to be found: on the contrary, there are several decisions which confirm it, and the Court has now unquestionable authority in cases in which part-owners cannot agree respecting the employment of a ship, to decree possession of the ship to the majority, or to arrest and detain such ship upon the application of a part-owner, or a minority of part-owners, who dissent from the intended employment of such ship, and to compel the other part-owners, or the majority, to enter into such a stipulation as will secure him, or the minority, to the full amount of the value of his or their share. The origin of this stipulation or bail bond is as follows: — The Court of Admiralty having jurisdiction in causes of disputes between part-owners respecting the possession or employment of their ship, and the manner of exercising that jurisdiction being by its process against the ship, retaining it, namely, under arrest, until the *sense* of the majority of owners had been discovered, in fact, until the cause of possession was determined; and in consequence of representations having been made to the Court in numerous instances of the damages sustained by ships lying for any length of time in harbour, the Court was induced to let them go, on bail being substituted in the place of the ship itself, to answer the demand set up in the cause of possession; and in a case reported in the 4th vol. of the Admiralty Reports, the taking of bail to answer a demand in a cause of possession is mentioned as practice of recent date. "The Admiralty Court has repeatedly

The bail bond, its origin.

gone the length of taking these stipulations in favour of a dissentient co-partner, and upon his application that a security may be given for the safe return of the vessel upon the voyage to which he dissents, or otherwise, for the estimated value of his own share. This practice has in some earlier instances been subject to some doubts, but it has entirely survived those doubts, and it has been formally recognised by the courts of common law, and forcibly recommended by the emphatical expressions alluded to, 'that ships were made to plough the ocean, and not to rot by the wall.' There is no doubt, therefore, of the legality of the initiatory measure here taken, of compelling such security to be given. The Court in this operation is not merely ministerial, for it compels the party authoritatively to find such security; it likewise in the usual termination, compels the party to pay the sums stipulated in the bond given for the security. The bail bond contemplates no other object than the safe return of the vessel, or in default thereof, the payment of the stipulated sum." *

Jurisdiction of the Admiralty Court unquestioned in compelling this security, and in pronouncing forfeited the bond.

The nature, then, of the bail bond, or stipulation given by the owners who employ the ship, regards only the event of the loss of the vessel and the payment of the estimated value (in that case) to the dissentient part-owner, and in case of such stipulation being given in the Admiralty Court, that court has no more power then, than it had originally to entertain matters of account between them, viz. between the part-owners employing the ship, and the part-owners dissenting.

Court of A. cannot in such causes entertain questions of accounts between part-owners.

* Lord Stowell, in the *Apollo*. 1 Haggard's Admiralty Reports, 306. See also the case of the *Margaret*, 2 ibid. 275., where Sir C. Robinson declined to pronounce forfeited a bond given for the safe return of a vessel *to a particular port of this kingdom*, the vessel having been carried in distress into another port and there arrested in suits of salvage and of wages, holding that while the vessel was within the jurisdiction of the Admiralty Court, safe and unsold, the application was premature.

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In the *Apollo* *, two part-owners, A. and B., had, at the instance of another part-owner C., entered into such security for the safe return of the ship in the sum of 3000*l.*, being the estimated value of C.'s share. The vessel was lost, a monition issued from the Admiralty Court against A. and B. to pay into the registry the sum of 3000*l.* to the use of C. A. and B. objected, praying that the Court would direct the registrar and merchants to inquire what loss, costs, damages, &c., had been sustained by reason of the interference of C., in his having by several methods prevented the ship from proceeding to sea; but Lord Stowell over-ruled such objection by reason that the bail bond related *solely* to the safe return of the ship, or to the payment of the stipulated sum in case of her loss, and that as a co-partner could not originate a suit for accounts in the Court of Admiralty, neither could it hang such a suit upon the peg of a stipulation which never contemplated any such matter; and the Court therefore decreed immediate payment of the entire amount. It is also clear that the Court of Admiralty cannot decree bail *for any earnings* that might be made in the intended voyage; if it did, the inevitable consequence would be, that the Court would be obliged to determine intricate and contested causes in relation to such earnings—causes which the Admiralty Court has always avoided, leaving them to another course of inquiry.† And it appears that when this stipulation is given by the majority, the dissentient part-owners, *i. e.* the minority, bear no portion of the expenses of the outfit, and are not entitled to share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others ‡: and

Court of A. cannot decree bail for any earnings,

for *semble* the minority bear no loss, and derive no profit.

* 1 Haggard's Admiralty Reports, 306.

† See *The Peggy*. 4 Robinson's Admiralty Reports, 304.

‡ Anon. 2 Chan. Ca. 36., Trin. T. 32 Car. 2.; and by Holt, C. J. in *Boson* v. *Sandford*, Carth. 63.

in a late case it was held, that a part-owner who had arrested the ship by process out of the Admiralty Court and had obtained security for his share, was bound to pay his proportion of the expense of the repairs and outfit incurred previous to the arrest, but not entitled to any share of the profits of the voyage.*

Possession invariably given to the majority,

The Court of Admiralty has, therefore, undoubted jurisdiction over the possession of British ships, and invariably decrees the possession and employment of the ship to a *majority* of the owners, upon their entering into a stipulation to indemnify the minority. From a late case it appears that the same practice will not prevail where application for possession is made by an equal *moiety* of the owners.

never to the minority,

nor to an equality of the interest, even if no appearance be given for the other moiety.

In that case†, the Court, at the suit of the owners of an equal half-part of a vessel, had decreed the usual warrant arresting the vessel till bail should be given to answer for her safe return; no appearance having been given for the other moiety, the Court was moved to grant a monition against them, to show cause why possession of the ship should not be decreed to them, the vessel lying high and dry on the beach, in a condition to become every day deteriorated. The authorities cited in support of the motion were Godolphin ‡, Molloy §, by which it was endeavoured to be shown, that parties with a moiety of interest have the same remedy as a majority. The *Egyptienne* ‖ was also cited, in which case the Court was moved to decree possession to the owner of a moiety, the owner or owners of the other moiety not having appeared; Lord Stowell refused to grant the

* *Davis* v. *Johnstone*, 4 Sim. 539.

† The *Elizabeth and Jane*. 1 W. Robinson's Admiralty Reports, 278.

‡ Introd. to View of Admir. Jurisdiction.

§ B. 2. c. i. sec. 3.

‖ Note to 1 Haggard's Admiralty Reports, 346.

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motion, but allowed a monition to issue calling upon the other interest to appear and show cause; but there the monition was not extracted and the point dropped. The following is an abridgment of what fell on this point, from the present learned judge of the Admiralty, holding that the Court had no jurisdiction to decree possession of a vessel to be given up to owners of a moiety, on the ground that the vessel is not to be employed and is in a state of deterioration; "for," said the learned judge, "a similar application might be made with respect to the owners of less than a moiety; because the very same reason would apply with equal force to the owners of a very small interest as to the possessors of a moiety. Circumstances similar to these must have occurred upon former occasions, but it does not appear that in any previous instance has the process of this Court been enforced for the purpose for which it is now prayed; and unless I was prepared to go the whole length—if this monition to show cause were to issue, and no sufficient cause were to be shown, unless I was prepared to follow it up by an attachment, it would be erroneous on my part to threaten, where I could not carry the threat into effect. Now, having looked at all the authorities on this subject which have fallen within my cognizance, it appears to me that this jurisdiction is denied to the Court; that the only case in which this Court can interfere in what may be termed a cause of possession, is where a majority of interest is vested in the persons applying, and where disputes arise among part-owners." As an additional reason against so doing, the Court mentioned, that if it were to attempt to exercise this power, it would have to consider the particular grounds on which the motion is founded, and to determine whether this or that voyage was the most beneficial for the owners, or whether it was expedient to wait the chance of a more advantageous voyage.

It appears clear, therefore, that the Admiralty Court can only interfere among part-owners to support the interest of a majority as to the employment of the vessel, and for the interest of a minority of the co-partners, can only enforce a bond for the safe return of the ship; but can, under no circumstances, transfer the possession to the minority or to an equality of the interest.

In these cases the Court can never enforce a sale.

The law of some countries has gone so far as to endeavour to compromise all interests by compelling, in cases of disagreement, a sale either of the shares of the minority, or of the whole ship, at the application of a majority of the owners, and sometimes even of a moiety of interests. But the Court of Admiralty, whenever it has assumed such an authority, has been prohibited by the superior courts, and cannot, therefore, force a part-owner, under any circumstances, to sell a share in a ship.

In cases of foreign ships, the Court will not interfere without consent of the ambassador, &c.

Although by the law of England as applied by the Admiralty Court, the majority of co-partners are entitled to the possession of the ship; and although in cases of ships belonging to British subjects, the Court has no hesitation in ordering possession to be delivered up, on the application of a majority of the owners, without entering very minutely into the causes of dissatisfaction existing between them and the master, still it is not so by the law of some other countries; and by reason of the diversity in the law of different countries upon this subject, the Court of Admiralty will not entertain such a suit in the case of a foreign ship without the consent of the accredited agent of the country to which she belongs; on this ground Lord Stowell, in the case of the *Johan and Siegmund* *, refused to alter the possession of a foreign ship at the suit of a number of persons who held fifteen sixteenth shares, against a master who was

* Edwards' Admiralty Reports, 242.

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the owner of the remaining sixteenth, remarking that "whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; and, therefore, by entertaining this suit, I might deprive the parties of those rights to which they are entitled by the law of their own country, as administered in those courts to which they are directly and properly amenable."

By the foreign law, the master may have a paramount right as owner in possession, or he may have a right to retain the possession as a security for his wages, or for the payment of accounts outstanding between him and the other owners. And thus where foreigners are alone concerned, the Court will not entertain questions of this description which do not properly belong to the *jus gentium*, but depend on the municipal regulations of different countries.*

But where such cases are referred to the decision of the Court of Admiralty by the consent of the parties, or by the intervention of the representative of the foreign state, devolving the jurisdiction of his own country on the Admiralty Court, then such suit may be entertained there, and of such practice there are several instances.

Sentence of a foreign court equivalent to consent of the ambassador.

The sentence of a foreign court, (being the proper tribunal,) has been held sufficient authority for the Court to entertain such a suit, such sentence being held to be equivalent to the consent of the accredited agent of the foreign country; and accordingly, in the *See-Reuter* †,

* The ordinances of *Oleron* and *Wisbuy* are silent on the subject of disagreement among part-owners as to the employment of a ship. By the ordinance of the *Hanse Towns* it appears, that the most voices, "*le plus de trois l'emportera sur les autres.*" The French ordinance directs, that in all cases which concern the common interest of the owners, the opinion of the majority in value shall be followed. *Cours de Droit Commercial*, Art. 621., and Abbott's Shipping, p. 99.

† 1 Dodson's Admiralty Reports, 22.

Lord Stowell dispossessed the foreign master and part-owner at the suit of a majority of the owners, producing the sentence of the Court of Admiralty of Rostock, of which place the ship belonged, directing the master to deliver up possession of the ship; such sentence being the positive declaration of the law by the proper tribunal, was upheld by the Court, and the vessel was decreed to be given up to the majority on bail.

This appears to be as far as the Admiralty Court will interfere in causes of possession of foreign ships at the suit of foreign owners; but in cases in which *British* subjects have set up a claim to vessels coming into the ports of this country, in the possession, and as the property of foreigners, the power of the Court of Admiralty is not so circumscribed that it may not inquire a little into the title by which the property is held. It has not considered itself so universally bound to abstain from entering into the question of title, and there is good reason why it should not; for if the *British* claimant cannot have justice done him here, he certainly cannot procure it elsewhere. *

Where British subjects are interested, the vessel being foreign will not induce the Admiralty to abstain.

The Court of Admiralty has, therefore, undoubtedly the power to inquire into the title in cases in which British subjects lay claim to a ship coming to this country in the possession and as the property of foreigners.

The Court of Admiralty having jurisdiction to detain a vessel at the instance of one part-owner until the others give security, *a fortiori*, it must have jurisdiction to detain a vessel in a suit instituted by the real owner against a mere wrong doer. † And where part-owners of a ship have appeared in the Admiralty Court, and affidavit has been made that the ship has been sold by the

Possession causes by rightful owner against a trespasser, and so far can decide questions of title.

* By Lord Stowell in *Experimento*. 2 Dodson's Admiralty Reports, 38.

† By the Court in the matter of *Blanchard, Baxter, and others*, 2 Barn. and Cress. 244.

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master, &c., without their consent, the Court has power to arrest the vessel, and if no appearance be given for the purchaser, the Court will decree possession *; and where in a dispute between the original owner of a vessel and a purchaser, under a sale by the master abroad, such sale having taken place as alleged without any authority whatever, and without any cause or necessity, possession was decreed to the original owner on bail.† In the case of the *Pitt*‡ the Court was prayed to transfer the possession of a ship from the person who asserted himself to be sole possessor and owner, to other persons who were former owners, charging an illegal transfer to the present possessor by a *course* of fraudulent transactions. Lord Stowell refused to alter the possession, holding that the Court was not authorised to make inquiries of this nature, involving a series of transactions charged on the one side to be fraudulent, and on the other denied to have the slightest intermixture of fraud in them. *Per cur.* "The Court is certainly in the habit of transferring possession from the actual holder, sometimes by its own movement, sometimes at the instance of other courts which have no direct power for that purpose; but it considers itself, and is bound to consider itself, as moving within very narrow limits, if it proceeds at all *originally* upon a question of title. It undoubtedly would not be inclined in any case, to transfer a possession without regarding the title of the party who claims the transfer; it must be satisfied that he is *potior jure;* and it must be in cases extremely simple that it acts on a merely preferable title to be reached by its own judgment. Where the possession is gained by force and violence, or by a fraud manifest upon the very face of the transaction;

* The *Lagan.* 3 Haggard's Admiralty Reports, 418.

† The *Partridge.* 1 Haggard's Admiralty Reports, 81., and see the note to that case.

‡ 1 Haggard's Admiralty Reports, 240.

or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests—there the Court feels no hesitation: but where a course of transactions involving fraud is objected, it declines entering into the question, and leaves it to be determined by the inquiry of courts which have ampler means of arriving at the real truth, and the real justice of the case; for there may be some incidental matters, such as repairs and other expenses, requiring the application of equitable principles, which this Court may not feel itself competent to administer. I may therefore lay it down as a rule for the conduct of this Court, that it is only in simple cases, in cases which speak for themselves, that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety." The Court refused to disturb the possession.

And thus it is that the Court of Admiralty has frequently to decide upon questions of title. Such questions were entertained by the Court of Admiralty in former times, to a much greater extent than lately; for formerly, all questions of disputed title which parties thought proper to bring before it for adjudication, were decided upon without reserve. After the Restoration, however, it was informed by other courts, that such matters were not properly cognizable therein, and since that time, it has been very abstemious in the interposition of its authority. The jurisdiction over *causes of possession* was still retained, and although the higher tribunals of the country denied the right of the Court of Admiralty to interfere *in mere questions of disputed title*, no intimation was ever given by them that the Court must abandon its jurisdiction over *causes of possession*.

A question of title may occur incidentally in a cause of possession, and it then becomes necessary for the Court to inquire into the title, at least so far as to

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satisfy itself that it may safely decree possession to the party seeking it. It cannot be laid down that the Court is to decline its jurisdiction in a cause of possession, on the mere averment of one of the parties that there is a conflicting claim of title. If the mere averment of title, without any examination into its foundation, would be sufficient to arrest the progress of a cause, the jurisdiction of the Court over cases of possession would be ousted altogether. It would be idle to say that the Court retained its jurisdiction, if, the moment a warrant was extracted by one party, the other was at liberty to put an end to the suit by asserting a title, resting, perhaps, on no foundation whatever. The nature of the title must be shown before it can be permitted to have the effect of arresting the cause in its progress. It must be made to appear that it is not a mere cobweb title that is set up, but that it is such as to raise a real and substantial doubt to whom the property belongs, and in that case, the Court would certainly decline to interfere as to the possession, until the title should have been determined upon by the courts in which such questions have been more usually agitated, in the modern practice of the law.* Lord Stowell has repeatedly held that it must be a very strong case of fraud, and free from all doubt and intricacy, in which he has felt authorised to disturb possession.

Power to compel the delivery of the ship's register.

The Court of Admiralty has also the power of ordering the restitution of the ship's register; for although, by the 34 Geo. 3. c. 68., justices of the peace are empowered to compel the delivery of such an instrument only in cases which differ from suits of possession in the Admiralty Court, such statute bears no reference to the Court of Admiralty in that parti-

* By Lord Stowell in the *Warrior*. 2 Dodson's Admiralty Reports, 290.

cular, the jurisdiction of the Admiralty being of older date, and of larger extent; and it is not uncommon for parties, after applications to the justices without effect, to resort to that Court for its monition. But although the Court has undoubtedly the power of compelling the master, &c., to deliver up the certificate of registry, it still proceeds with the same caution as it does when called upon to transfer the possession, where the Court has been called upon to act upon a registry; and if the history of that register has disclosed facts that *may* vitiate it in that character, the Court has declined interference in favour of parties, whose title to be considered registered owners is subject to doubt; it is only in clear cases that the Court would interfere, where the instrument itself, as well as the proportional shares of the parties, are free from objections; but if both are subject to objections, the Court would not lend its authority, where it may all be employed upon matters so involved in error, as to approach to the nature of absolute nullities. In the case of the *Frances* *, the Court refused to order the restitution of the ship's register, on the ground, that it was a case so intricate in its circumstances as to prohibit the Court from proceeding to the strong measure of changing the possession of the ship's register. "I confess, I think," said Lord Stowell in that case, "that not only the confused state of the private interests here, but likewise important questions of public policy, prohibit me from proceeding;" and not taking upon himself to pronounce what sort of interests the involved transactions in that case gave to the respective parties, and considering them to be the subject of a more direct and stringent inquiry, to be applied to a formal investigation by a proper court, and not to be decided here upon a mere bye question of the possession of the register.

* 2 Dodson's Admiralty Reports, 431.

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The fourth section of the 3 & 4 Vict. c. 65. gives the Court power to decide all questions of title arising in any cause of possession, &c.

It has been thought fit to enter thus fully into the jurisdiction of the Admiralty Court in these cases of disputed title, for, by a recent statute*, the authority of the Court has been much extended, and particularly in this respect. The legislature also has, at the same time, thought fit to give to it other methods of proceeding, by which such cases may be more fairly and properly investigated; the Court having the power of compelling the examination of witnesses *viva voce* in open court, and having generally the same powers with respect to evidence as have the courts of common law, and also having authority to direct issues to be tried before the superior courts at Westminster, &c. It is enacted by the fourth section of that statute, that the Court of Admiralty shall have jurisdiction to decide all questions as to the title to, or ownership of, any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said Court, after the passing of this act.

This, therefore, *more* than confirms a great deal of what has been written in the preceding pages, and some part of the caution with which the Court proceeded formerly in cases of disputed title would, under the present statute, be needless;—but how much so, it is not for the author of this book to anticipate: he has thought proper to endeavour to illustrate the sage caution with which these questions of title were formerly entertained, and not to presume so far as to speculate upon how far they are affected by this important statute, but which certainly appears to give the Court of Admiralty jurisdiction in all causes of title without reference to their intricacy, where such investigation may be necessary,

* 3d & 4th Victoria, c. 65., printed in the Appendix to this Treatise.

and arising in any cause of possession, salvage, damage, wages, or bottomry.

The claims of mortgagees.

The 45th section of the statute 6 Geo. 4. c. 110., which relates to transfers of ships by way of mortgage, was held by Sir C. Robinson, in the case of the *Fruit Preserver* *, not to make a mortgagee such an owner as to give him the benefit of the power of the Admiralty Court in a cause of possession; and in that case a warrant of arrest for the purpose of transferring the possession of a ship to the holders of a conditional transfer, to secure a debt of 400*l.*, was refused, the Court considering it had no jurisdiction to grant a warrant of arrest to transfer possession to a mortgagee or conditional purchaser; and in the *John* †, also, the Court refused to disturb possession at the suit of a person whose title rested on a conditional assignment of the vessel, the vessel not having been reduced into possession, nor clothed with a single act of ownership. Several cases might be cited in which the Court refused to entertain questions between mortgagees and owners, holding that a mortgagee is a stranger to the jurisdiction of the Admiralty Court; and whether a mortgagee was or was not foreclosed, — whether a mortgagee was the legal or equitable owner, were held to be questions proper for the decisions of other courts. As to whether a mortgagee (although it is clear that he could not *institute* a suit in the Admiralty) might appear to protect his interest, appears to have been a question of some doubt: the better opinion seems to have been, that he might have appeared in a suit to protect his interest when a suit was commenced, although he had not such an interest as would entitle him to initiate a suit. Be that as it may, by a recent statute ‡ extending the jurisdiction

* 2 Haggard's Admiralty Reports, 181.

† Ibid., 305.

‡ 3d & 4th Victoria, c. 65., printed in the Appendix.

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By the third section of the 3 & 4 Vict., whenever a vessel is arrested, and the proceeds brought into the Registry, the Court to have jurisdiction over claims of mortgagees.

of the Admiralty Court, such doubts are entirely removed, and such opinion confirmed; for now, when any ship is under arrest by process from the Admiralty, or when the proceeds have been paid into the registry of the Court, it has a full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship, and to decide upon any suit instituted by any such person in respect of any such claim or cause of action. This statute appears, therefore, to have obviated all difficulties which were considered formerly to have existed as to the title to the ship by mortgage in the Admiralty Court; and it has been held that, incidentally, the Court has the same power as to the freight as well as to the ship, for otherwise the amount of the proceeds of the ship itself could never be determined.* But it appears that the freight must be under the control of the Court, in the ordinary course of its jurisdiction and by virtue of its ordinary process; for a mortgagee is no more entitled now, than he was formerly, to initiate a suit in the Admiralty Court; he cannot arrest a vessel for the purpose of enforcing bail for her safe return to this country. Motion on behalf of a mortgagee for a warrant of arrest in this intent, was refused in the case of the *Highlander*.† But in the more recent case of the *Fortitude*‡, the power conferred on the Admiralty Court by the new statute in questions of mortgage, was fully discussed. The vessel was arrested originally in a suit for mariners' wages, and such suit was still pending, when a principal action was entered on behalf of the mortgagees; the warrant of arrest as against the freight was executed by the arrest of the cargo, and an appear-

Over the freight as well as the ship.

A mortgagee cannot now, more than he could before the statute, initiate a suit of possession.

* See the *Dowthorpe*, by Dr. Lushington, reported in 2 Wm. Robinson's Admiralty Reports, 73.

† 2 Wm. Robinson's Admiralty Reports, 109.

‡ Ibid., 217.

ance under protest was given on behalf of the consignees of the cargo, and it was contended for them that the Court had no jurisdiction upon the freight, and that as regards the freight it was a principal action. The Court held that there was a material distinction between a case where the freight was under the jurisdiction and control of the Court, in its ordinary course, and a case where the freight had not been arrested in the primary action at the suit of the mariners, as in ordinary course, by persons claiming a lien thereon. [The ship having been arrested by the mariners, the right of the mortgagees to proceed against the ship was not denied, but the question was as to the freight.] The learned judge, with reference to the statute 3 & 4 Victoria, remarked: "Prior to the passing of this statute, it was more than doubted in this Court, whether, in cases where a ship had been arrested under the jurisdiction of the Court, the Court could take cognizance of the claims of mortgagees, or of any questions of title to the ship itself. In order to obviate this state of things so detrimental to justice, the statute 3 & 4 Victoria was enacted. The intention of the legislature in passing the statute, I conceive, was that the remedy should be commensurate with the evil. It was not, I apprehend, intended to confer any new separate and distinct powers on this Court, but merely to enable the Court to exercise its ordinary jurisdiction to the full extent. * * * * * In the course of the argument it has been contended [by counsel for the part-owner] that these two sections [third and fourth] are to be taken together, and that the question before the Court must be governed by the construction of the two sections in connection. My opinion, I confess, does not agree with this argument; in my judgment, the question solely and entirely depends upon the third section alone." The construction the Court put upon that third section was, that the

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jurisdiction conferred was not as to any question which may arise out of a deed of mortgage, but as to the ship itself being mortgaged; this being the construction which more nearly assimilates to the purposes for which the act was passed, namely, that it was intended as a remedial act, and to obviate certain evils and no further.

In causes of possession, it is the *legal* title only which is recognised by the Court of Admiralty, any equitable title or beneficial interest in a ship being foreign to its cognizance; and where a vessel was arrested at the instance of eight persons, alleging themselves to be the owners of certain shares therein, but on its being objected that two of them were legatees only, and as such, possessed of a mere equitable and no legal interest in the property in question, it was held that they had no *persona standi* as legatees in a suit of that nature, and that the bequest to them being vested in trustees for their benefit, they had not such an interest as it was competent for the Court of Admiralty to take cognizance of; and as in this case the asserted interest of the promoters was reduced, the majority of the interest being still in possession, the Court could not proceed to alter the possession.*

A subject incidental to causes of possession, viz. suits for the restitution of goods *piratically* taken on the high seas not as prize, is treated under the subsequent title of Damage.

It should be further mentioned here, that, although in a cause of possession the Court of Admiralty has the power of compelling the ship's register, papers, &c. to be delivered up, it cannot decree a monition against a party in possession of the ship's papers when not incidental to such a suit.†

* 1 Wm. Robinson's Admiralty Reports, 64., and see the *Sisters*, 4 Robinson's Admiralty Reps., 275. and 5 Ib., 155. *Martin of Norfolk*, 4 Ib., 293. The *Frances*, 2 Dodson's Admiralty Reports, 424.

† The *Lusitano*, 1 W. Robinson's Admiralty Reports, 166. But see also the *Barbara*, 4 Robinson's Admiralty Reports, 2. where, in a bottomry case, the ship was directed to be sold under a decree of the Court, but it appeared that the register was detained in the possession of W. S. under a sale pretended to have been made to him by the original owner to defeat the effect of the bottomry bond. It would appear from the report that the Court, with much hesitation, granted a monition against the asserted purchaser.

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OF THE JURISDICTION OF THE COURT OF ADMIRALTY ON BOTTOMRY BONDS, AND HEREIN OF AS MUCH AS IS EXERCISED OF THAT JURISDICTION WITH RESPECT TO REPAIRS, NECESSARIES, AND SO FORTH, SUPPLIED TO SHIPS.

SECTION I.

Derivation of the word.

THE derivation or figurative origin of a word is not always the best manner of discovering its full meaning or application, but this proof we may apply with great safety in this instance, for the *bottom* or keel of a ship is certainly an admirable *figure* by which the whole *ship* itself is expressed, for the purpose of ascertaining the interests of all who engage in such a transaction; *parte pro toto sumpta, ita primum appellata, cum etiam lingua Gallorum antiqua et Britannica Bodo vel Bodun fundum aut profundum signet in quem navis fundum, vel ipsam navem ejusque* *, &c. The owners of the ship are bound by their property in the bottom of the ship, which is always, we shall observe, the subject in pledge; for although there are but rare cases of bonds on the cargo, the term bottomry, which has been given to such bonds, is hardly consistent with the real signification of the word, and the more ancient name which was given to them, appears more correct. These bonds were in former times distinguished by the name of *respondentia.*

These contracts are usually entered upon by the master of the ship, on the part of the owners, who are bound to the performance of every *lawful* contract made by him relative to the employment of the ship, and to the means of employing it.

* *Locinius.* See Molloy, book ii. chap. 11.

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And if the master of a vessel has occasion for money to victual or repair his ship, or for any other purpose necessary to enable him to complete the enterprise in which she is engaged, whether the occasion arises from any extraordinary peril or misfortune, or from the ordinary course of the adventure, and if he be in a *foreign country* and cannot otherwise obtain it, he may borrow money on bottomry at maritime interest, and pledge the ship and the freight to be earned in the voyage for repayment at the termination of the voyage. When this is done, the owners are never personally responsible; the remedy of the lender is against the *master* or the ship.*

Definition.

The definition given by Lord Stowell in the case of the *Atlas* †, and which he stated to have been collected from all the writers that had adverted to the subject, is in these words: "Bottomry bonds are contracts in the nature of mortgages of a ship on which the owner ‡ borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and pledges the keel or bottom of the ship, *pars pro toto*, as a security for repayment. It is, moreover, stipulated that if the ship is lost in the course of the voyage by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship shall arrive safe, then he shall be paid back his principal, and also the interest agreed upon, called marine interest, however this may exceed the legal rate of interest."

In the *Roman* law, which treats largely of these contracts, it is called *fœnus nauticum* or *usura maritima*, and the high interest which is permitted and which is to reimburse the lender (who in all cases, and not the

* Abbott's Shipping, Shee's edition, p. 156. Molloy, b. ii. c. 11. s. 11.

† 2 Haggard's Admiralty Reports, 48.

‡ Now more usually the master for the owner.

borrower, is to run the risk), is therein denominated *periculi pretium*, or the price of the hazard which the lender incurs.

We must, in treating of this particular subject, enter upon the *law* relative to it, at least so far as is necessary to obtain a view of what is, or what is not, a bottomry bond; for if the bond be of bottomry, then has the Admiralty jurisdiction, but if not, then must the lender resort to some other tribunal for the enforcement thereof; the first rule would appear to be, that the ship itself must be (at least a part of) the lender's security, so as to clothe the bond with the privilege alluded to. The term bottomry, is not, therefore, to be applied to a contract by which the repayment of money is made merely to depend on the success of a voyage; for that is a loan, either upon an adventure or upon personal security: to constitute a bottomry transaction, the lender, whoever he is, must secure at least the bottom of a ship, for the repayment of what is advanced. Having thus had some insight as to the nature and meaning of the word, and which to a consideration of this subject is indispensable, we will now proceed with our real title, viz. Jurisdiction.

Admiralty jurisdiction in these cases is founded on the necessity.

The encouragement of navigation is the simple and self-evident reason by which contracts of this nature are so much the favourites of the Admiralty Court; for here again, by its jurisdiction against the ship, the remedy is prompt and efficacious, and by these means the owner's interest as well as the lender's security are *equitably* protected. If the reader take up any number of the Admiralty Reports, he will not fail to discover how much the *necessity* for a transaction of the nature re-referred to, is looked to in each individual case, as would the *consideration* be looked to in any case which may be called analogous in a court of common law; and it has been held, that where the master of a ship who had

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given a bottomry bond was also a part-owner, he can in the Court of Admiralty defend himself against such bond, where no necessity existed for it; "for," said Dr. Lushington, sitting as one of the judicial committee of the Privy Council, "such argument (namely, that the master, also part-owner, by whom the hypothecation was effected, was precluded from joining with his co-owners in impugning the validity of the bond) cannot avail in the Court of Admiralty, because the authority of that court in the case of bottomry bonds is founded upon the existence of, and necessity arising from, the want of personal credit, and unless that fact be established, or at least after due inquiry the credible appearances of such necessity, the Court of Admiralty has no *jurisdiction* to enforce the bond. It is not in the received meaning of the word bottomry bond at all, and of other bonds the Court of Admiralty takes no cognizance."* They must arise from the destitute situation of a master in a *foreign port* unable to obtain the necessary supplies for his vessel on the personal credit of himself or his employers. The very purpose for which bottomry bonds were created, was the protection of the foreign merchant advancing the money, who is supposed to be an entire stranger to the owners of the ship and cargo, and to have no means of judging of their solvency: with them he has no privity, and has nothing to look to for his security, but the visible property of the ship in the place of his residence." †

The jurisdiction of the Court of Admiralty, in respect to bonds of this nature executed abroad, has been so much encouraged and protected by the superior courts at law, as to make it a very pleasing subject for the admiralty lawyer to enter upon: for the few prohibitions (well founded) which have reached Doctors' Commons,

* *Soares* v. *Rahn.* 3 Moore's Privy Council Reports, 1.

† *Rhadamanthe.* 1 Dodson's Admiralty Reports, 201.

have been grounded on a satisfactory proof of the Admiralty having proceeded to adjudicate on a question other or more than bottomry, properly so called; but their proceedings upon a real bottomry case have in numerous instances been protected and encouraged.*

RULE I. — *To constitute a bottomry bond, and to give the Admiralty jurisdiction, the* ship *must be pledged.*

Such bonds have always been upheld by the Court of Admiralty with a very high hand, and it would be very detrimental to the interests of the commercial world if they were not so upheld. The jurisdiction of the Court over the subject matter of these bonds, has been allowed by the courts of common law upon various occasions, although they are, by the Court of Admiralty, viewed in a light very different from that in which bonds of other descriptions are considered in those courts. In the case of *Johnson* v. *Shippen* †, the jurisdiction of the Court of Admiralty was expressly acknowledged. That was a case in which "a ship put into *Boston* in *New England*, and there the master took up necessaries and gave a bill of sale, by way of hypothecation, and now there being a suit against the ship and owners to compel repayment, a prohibition was moved for; and the Court held, that the master could not by his contract make the owners personally liable to a suit, and, therefore, as to them, granted a prohibition; but as to the suit *against the ship*, denied a prohibition, for the master can

* Bridgman's case, 12 Jas. 1. Hob. 11. Moor. 918. 1 Ro. Ab. 530. *Scarborough* v. *Lyons*, 3 Car. 1. Latch. 252. Noy, 95. *Corset* v. *Husely*, 1. W. and M. Comb. 135. Rep. temp. Holt, 48. *Benzen* v. *Jeffries*, 8 & 9 Wm. 3. 1 Lord Raym. 152. *Johnson* v. *Shippen*, 2 Ann. 2 Lord Raym. 982. Salk. 35. 6 Mod. 79. Rep. temp. Holt, 48. *Lister* v. *Baxter*, 12 Geo. 1. Stra. 695. *Menetone* v. *Gibbons*, 29 Geo. 3. 3 Ter. Rep. K. B. 267.

† 1 Salkeld, 35.

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have no credit abroad, but upon giving security by hypothecation, and it is not reasonable we should hinder the Court of Admiralty to give a remedy where we can give none ourselves."

In the same case as reported by Lord Raymond *, Mr. Justice Powell is represented to have said:—"The original matter is cognizable in that court (the Court of Admiralty) and the hypothecation upon land is of necessity, for it must be done in port and cannot be done at sea, and the party has no remedy but at maritime law." Such is the foundation on which these bonds stand. They are considered valid upon the ground of necessity only, and it is upon the same principle of necessity that a later bond is entitled to priority of payment over a former. This course of payment is indeed directly contrary to what takes place in the case of common bonds, where those of a subsequent date can only be enforced after all demands upon former bonds shall have been first paid and satisfied. In this species of security, which is entered into under the pressure of necessity, the order of payment is very properly reversed, since, without the subsidiary aid of a later bond, the property would be totally lost both to the owners and to the former bondholders. But this privilege is confined to bonds given under this species of necessity in a foreign port, where the master and owners have no personal credit, and no other means of procuring the necessary supplies for the repair of the ship. It by no means follows that the same privilege is to be extended to every species of security which may affect the ship.

Of bottomry bonds, the latter is entitled to priority of payment over a former.

In the case of the *Rhadamanthe*†, from which the preceding has been abridged, it appears clear that maritime bonds must not only arise from the destitute situation of the master in a *foreign* port, before they

* Vol. ii. 983.

† 1 Dodson's Admiralty Reports, 201.

will be such bottomry bonds as can be enforced by the aid of the Admiralty Court; but that, to constitute a bond, although of a maritime nature, a bottomry bond at all, and, as such, within the jurisdiction of the Admiralty Court, the money must not be advanced on personal credit, but *on the ship:* for, in the former case they have a remedy, and can recover at common law; and as in that case it was held clearly established that the advance was not with a view to any credit on the ship, the Court refused to pronounce for such bond as one entitled to the same privilege which is extended to bottomry bonds.

The money must be advanced on the *ship* and not on personal credit; though a collateral security, such as bills of exchange, taken *at the same time,* will not diminish validity of a bottomry bond.

But very frequently in bottomry transactions a collateral security is given and taken at the same time, such as bills of exchange, &c.; where this additional security has been taken, it has never been held to exclude the bond or diminish its validity; but where the money has *first* been advanced on personal credit and a bill of exchange given as security, such advance cannot be converted into a bottomry transaction, the most essential requisite of a bottomry bond being failure of personal credit.* The conversion of a transaction on personal credit into one of bottomry, will be noticed in a subsequent part of this treatise.†

RULE II. *To give the Admiralty jurisdiction, such bond must be taken in a* foreign *port* (*this rule is subject to the exceptions herein given*).

The privileges which, as mentioned above, are conferred on bottomry bonds, are confined to such bonds as are given under pressure of necessity in a *foreign* port; for, if it be one taken in *this country,* for more reasons than one, the Court of Admiralty will not hold the question, for the common law allows the jurisdiction

* The *Augusta,* the *Jane,* 1 Dodson's Admiralty Reports.

† Vide post, p. 78.

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of the Court of Admiralty, upon the ground of necessity only, and there can be no necessity for such bond in England, where personal credit can be obtained; and therefore, if a contract of this sort be made by the owners themselves in this country before the beginning of a voyage, by the terms of which the ship is pledged as a security, the lender can entertain no suit in the Admiralty against the ship, as he could in the case of hypothecation for necessaries in a foreign port.* But it appears that a bottomry bond given abroad by an owner of a ship who was on board, for the necessities of a voyage, and was not able to obtain money otherwise (the master not being a party thereto), is not only valid, but also that the Court of Admiralty has jurisdiction to enforce such a contract; for in the case of the *Duke of Bedford*†, a bond of that nature granted for the necessities of a voyage was enforced against the ship, and it was held that it might be granted either by the owner or master; the Court, Sir C. Robinson observing, after an elaborate judgment, pronouncing for such bond:—"The only doubt which occurs to me on this point, arises from the limited jurisdiction allowed to this Court, which has been confined usually to the cases of bonds given by a master at a distance from the owners; but that would be an objection rather to the jurisdiction of the Court, than to the essential quality of the bond; and, as the objection has not been raised, and may yet be raised, if it should be thought advisable, I shall not think it my duty to anticipate such an objection after the cases to which I have referred, of bonds given by owners alone, and which have been sustained in this Court. I feel myself bound, therefore, to uphold this bond." As the objection to the jurisdiction

Bottomry bond cannot be given by *owners in this country*, so that lender can proceed in Admiralty against the ship.

Can by *owner abroad*, so that &c.

* Abbott's Shipping, p. 153. Shee's edition, and the authorities there cited in note.

† 2 Haggard's Admiralty Reports, 294.

was never raised, this case is clearly a good authority in favour of the Admiralty jurisdiction in such circumstances; for the same reason applies to an owner as to a master; for whether the owner cannot borrow money in a foreign port on his own personal security, or whether the master cannot in his absence also obtain money on the owner's security, would appear to work no distinction; there would be the same *necessity* for pledging *the ship* to pursue the voyage, and would therefore give the Admiralty jurisdiction. The authority too, of the *Barbara**, establishes the same principle. In that case the ship was arrested by process of the Admiralty Court, for the enforcement of a bond which had been given by the master of the vessel, who was also the owner, in Jersey.

We have seen that a person lending money on bottomry to owners themselves in this country, before the beginning of a voyage, can have no remedy against the ship in the Admiralty Court: we now come to the point, as to whether a person advancing money under the same circumstances to the master, has such a remedy.

Master cannot, &c., *in place of owner's residence*, so that, &c.

"It is obvious that a loan of money upon bottomry, while it relieves the owners from many of the perils of a maritime adventure, deprives them also of a great part of the profits of a successful voyage; and, therefore, in the place of the owner's residence, where they may exercise their own judgment upon the propriety of borrowing money in this manner, the master of the ship is, by the maritime law of all states, precluded from doing it, so as to bind the interest of his owners without their consent." †

* 4 Robinson's Admiralty Reports, 1.

† Abbott's Shipping, p. 154., and authorities there cited; Hanseatic Ordinance, art. 58.; Hanseatic Ordinance of 1614, tit. 6. art. 1.; French Ordinance, liv. ii. tit. 1.; Du Capitaine, art. 17. and liv. iii. tit. 5. Des Contrats à la Grosse, art. 8.; Emerigon, tom. ii. p. 424.; Molloy, book ii. c. 11. s. 11.; Weskett, tit. Bottomry, sect. 20. 23. *Lister* v. *Baxter*, 2 Stra. 695.

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It may here be observed, that it is not necessary for the purpose of determining the jurisdiction, that we should enter upon the point as to who may lend money on bottomry, for such point would relate to the validity of the bond, and not to the jurisdiction of the Court; the ship being pledged by a person having authority to do so, is what gives the Admiralty the power to proceed against the ship. We must still adhere to the general rule given above, viz. that a master has no such authority but in a foreign port, and it becomes necessary that we should first consider what is a *foreign* port for such purpose. As this general rule will be found to be subject to exceptions, it becomes necessary that we should observe upon what reason or policy it is founded. It appears to be this, that the want of making the owners *personally* liable, creates the necessity of the ship being pledged, and when the owners cannot be made so liable, then the power of pledging the ship, and, consequently, of giving jurisdiction to the Admiralty, exists: that is to say, in fact, that although locality may generally determine whether or not the owners could be made personally liable, and that there was therefore no occasion to resort to the ship, still, as an urgent necessity for pledging the ship, was the reason upon which the rule was founded, so ought the exception to be made in favour of such necessity, if it exist, viz. of resorting to the ship, even without reference to the general rule of locality; this principle appears fairly deducible from the cases and authorities which follow.

Lord Chancellor Hardwicke * said: "Certainly by the maritime law the master has power to hypothecate both ship and cargo for repairs, &c. during the voyage, which arises from his authority as master, and *the necessity thereof during the voyage*, without which, both

* As quoted in Abbott's Shipping, Shee's edition, p. 144.

ship and cargo would perish, therefore both that and the law of this country admit such a power. But it is different where the ship is in port, *infra corpus comitatus*, and the contract for repairs, &c. made on land in *England;* then the rule of that law must prevail. I know no case where the repairs, &c., whether it was by part-owners or sole owner, master or husbands, have been held a charge or lien on the body of the ship; *Watkinson* v. *Barnardiston**, being a direct authority to the contrary: and if the ship in the river, *infra corpus comitatus*, should be proceeded against and stopped for such debt, the courts of law would issue a prohibition, the contract being on land and *not arising from necessity.*" In this case his lordship dismissed the bill so far as relief was sought against the body of the ship, but expressing a doubt as to the personal charge upon the owners, directed a trial at law upon that question. In these cases the want of necessity for making the ship liable is a very prominent feature in his lordship's dicta.

The master of the ship is by the maritime law of all states prohibited from borrowing money on bottomry in *the place of the owner's residence*, in French *la demeure des proprietaires;* what then is to be considered the residence of the owners? "With us, I apprehend, the whole of *England* is considered for this purpose as the residence of an *Englishman;* at least before the commencement of a voyage," says Lord Tenterden.† Before the incorporation of Ireland with this country by the Act of Union, *Ireland* was held to be a foreign country in the case of an *English* ship for the purpose of hypothecation. As to how far this well established rule is affected by the Act of Union, does not appear further than this. In the case of the *Rhadamanthe*, Lord Stowell observed: "It has already been determined in this Court that the ports of

* 2 Wms. 367. † Abbott's Shipping, Shee's edition, 155.

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Ireland are, for the purposes of hypothecation, to be considered as *foreign* ports; and nothing has occurred to alter the opinion of the Court, or to induce it to depart from the rule laid down in a former case, except the incorporation of *Ireland* with this country by union. I do not know that that circumstance would necessarily have the effect of producing any material distinction, but I forbear to give a decided opinion upon the point since the case does not require it."

In the *Barbara* *, the master, who was also owner, and described in the bond as "of *London*, master and owner of the brig *Barbara* of *Jersey*, now lying in the river of *Jersey*, and bound to *London*," had given bottomry bond for the payment of the money advanced: the Court of Lord Stowell granted a warrant to arrest the ship at the application of the bond holders.

Master can, &c., in place of owner's residence, if communication with them be impossible, so that, &c.

The two following cases confirm the rule (or rather the exception to the rule) which it is now endeavoured to illustrate, viz. that, the necessity for pledging the ship is as much to be looked to as the locality: the first is the *Ysabel*, decided by Lord Stowell †, and in the course of the judgment the following fell from that learned judge (but it should be premised that this was the case of a Spanish ship, on a voyage from *Alicant* to *London*, and had put into the port of Corunna in distress, and where, to repair the vessel, such bottomry bond had been given by the master, who unsuccessfully tried the means of obtaining the advances; the validity of this bond was contested, by reason that the master had no right to hypothecate his ship and cargo except in a foreign country, and that such transaction took place within the limits of the kingdom in which the owners resided). *Per. Cur.* "But it was not in the same province of that distracted kingdom that the transaction took

* 4 Robinson's Admiralty Reports, 1.

† 1 Dodson's Admiralty Reports, 273.

place, nor could the master, under the circumstances in which he was placed, have applied to his owners for assistance. If, indeed, he had had an opportunity of corresponding with the owners, it would have been his duty so to have done, and I should, under such circumstances, have held him not to have been in that state of extreme necessity, in which alone the law allows to the master the power of hypothecation. It is true that it is usually required, as a condition necessary to the validity of bonds of this kind, that they should be executed in a foreign port; but the law does not look to the *mere locality* of the transaction. The validity or invalidity of the bond does not rest on that circumstance only, but upon the *extreme difficulty* of communication between the master and his owners. Occasions may arise in which the different ports of the same kingdom, may be as much separated, and cut off from all communication with each other, as if they were situated in the most distant parts of the globe: and such was the case with respect to the different ports of *Spain* at the time when this transaction took place. The difficulty of communication was, in fact, greater than if the ship had been in a foreign port, for the interruption of correspondence between the different parts of *Spain*, was as far as possible complete; and if the policy of the law, in allowing this authority to the master to hypothecate his ship and cargo, is founded on the extreme difficulty of communication with his owners, there is no reason for saying that there was not abundance of difficulty to authorise him to do so in the present instance. In the condition in which *Spain* then stood, it is but equitable to apply to the different ports of that kingdom, the same considerations that are usually applied to separate and distinct kingdoms, and I am therefore of opinion, that the bond is not to be deemed invalid upon this ground." The next case referred to, and which is a more complete authority, is that of the

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Trident *, decided by the present learned Judge of the Admiralty Court. This was the case of a bottomry bond, granted by the master of a British vessel, the owner of which resided in Scotland; she sailed from Kirkaldy in North Britain in October, 1835, bound on a voyage to the East Indies and back; having suffered much damage in the course of her homeward voyage, she was compelled by stress of weather to bear up for Plymouth, where she arrived February 1838. Here the master wrote to Scotland, to apprise the owner of his arrival; in the same month, the personal representative of the owner arrived at Plymouth, with the information that the owner was dead insolvent, and that he (such personal representative) did not intend to administer to his effects, and that he would make no advances on account of the vessel. Under these circumstances, the master applied by letter to the consignees of the cargo for advance of money, but to no effect farther than that one of such consignees authorised his agent at Plymouth to advance money on the security of a bottomry bond. The money was thus advanced, and the master executed a bond hypothecating ship, cargo, and freight. It was objected against the validity of the bond that the owner being a British subject resident in Scotland, the transaction in question took place within the limits of the kingdom in which the owner resided. The authority of the Court, therefore, to enforce the bond, was denied upon the circumstance of the owner's residence in Scotland. *Per. Cur.* "Now looking to the principles upon which bonds of this description are founded, I must say, that in my apprehension, the jurisdiction of this Court to inquire into their validity, does not depend upon the *mere locality* of the residence of the owner. It depends, I think, upon the *absolute necessity* of the case, where the master is

* 1 W. Robinson's Admiralty Reports, 29.

in such a condition that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship. This, I apprehend, is the true principle upon which the master's power to mortgage the property of his owners is founded, and it is a principle consistent with public policy and highly advantageous to the interests of British commerce. What would otherwise have been the consequence in the immediate case under consideration? The vessel arrived at Plymouth in distress. The master was without funds, and without the means of raising funds upon personal credit to make the necessary repairs, without which the ship could not have gone to sea. The owner was dead insolvent. His personal representative declined to interfere, and the consignees of the cargo refused to make sufficient advances but upon the security of a bond of bottomry. If the master had not executed the bond in question, the inevitable consequence must have been, that this vessel, with a valuable cargo on board, must have laid at Plymouth and perished.

"Being therefore of opinion that the authority of this Court to take cognizance of these bonds does not depend upon the mere locality of the owner's residence at the time the bond is given, a doctrine repudiated by Lord Stowell in the case of the *Yzabel**, and that the great principle upon which such instruments are founded is the absolute necessity of the case, and the impossibility of procuring money upon other terms, I must hold that I have jurisdiction to investigate the matter at issue in the present instance, and it only remains for me to consider, whether the particular circumstances of the case will justify me in pronouncing for the validity of the bond in question."

From these authorities it would appear clear that the

* 1 Dodson's Admiralty Reports, 273.

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master of a ship may borrow money on bottomry even in the country in which the owners reside, provided that communication with them be impossible, and that money cannot be obtained by other means; and that the authority of the Court of Admiralty to enforce such bond does not depend upon the locality of the owner's residence, but upon the necessity of the case.

And in an action* for the supply of necessaries to a ship under the sixth section of the 3d and 4th Victoria, c. 65., in which, for the purpose of showing that the ship was a foreign vessel, having been built and registered at New Brunswick and belonging to owners who resided at Nova Scotia, it was argued, on the part of the person who had supplied the ship with necessaries, that, in questions of bottomry, the ports of Nova Scotia and New Brunswick had always been considered as foreign ports, for the purpose of giving a validity to the execution of bonds executed therein; and the principle upon which this had been done was fairly to be applied under the circumstances of this case. The following expression by the present learned Judge of the Admiralty is valuable as bearing on the point which has just been discussed. "With respect to the argument that in cases of bottomry bonds executed in the ports of Nova Scotia and New Brunswick have been considered as executed in foreign ports, so as to give a due effect and validity to the execution of such bonds, it is to be observed that the policy of the law has uniformly extended a great latitude of construction upon this class of instruments, and the same consideration does not apply to the construction of the statute which has been referred to."

The principle in this case is very valuable, as showing that, with reference to a bottomry bond, the same strict-

* The *Ocean Queen*, 1 Wm. Robinson's Admiralty Reports, 457.

ness will not apply as to foreign ship or foreign port as it will in the case of necessaries furnished to a foreign ship under the Act of Parliament.

RULE III.—*The Admiralty has no authority to enforce an absolute bond; it must be founded upon sea-risks, and be defeasible by the destruction of the ship in the course of her voyage,* i. e., *it must not be absolute and without dependence on the accidents of the voyage.*

The *pretium periculi.*

The hypothecation or bottomry bond, known to the civil law and acted upon with an undoubted authority by the Court of Admiralty, is a bond whereby the master or captain of a vessel not having any credit in the port, is enabled to obtain money for the repair of the ship and its equipment for the voyage, upon what is called maritime interest. In the *Roman* law, in which it was familiarly known, it was called *usura maritima* or *fœnus nauticum.* The extent or value of this security for repayment was not limited, for it was not certain, but only eventual, dependent upon the safe accomplishment of the intended voyage. If the ship arrived safe, the title to repayment became vested; but if the ship perished *in itinere,* the loss fell entirely upon the lender. Upon that account the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and, therefore, was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was, therefore, entitled to charge his *pretium periculi,* his valuation of the danger to which he was exposed.

A contract similar to this upon the cargo of the ship, is called a *respondentia,* but is of rarer occurrence. This may be enough to explain the policy upon which the above rule is founded, for it would appear contrary to

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reason that a court should have jurisdiction to uphold a bond, securing so high an interest as could be justified only by the extreme risk which the lender runs, if no such risk exists; and, moreover, if a bond be given absolute, independent of all contingency, and to be enforced whether the ship arrive to harbour or not, it necessarily follows that not only the ship, but the whole property of the party, is equally pledged,—his property as well upon the land as upon the sea: so that the ship, if she arrive to port, is pledged no more than is the other property of the individual, whether upon land or sea, and if the ship perish, such other property becomes alone liable.

The rule given above may be said to be the rule which was laid down in the *Atlas**, a case which received a most elaborate inquiry from the Admiralty Court, and also on appeal to the delegates, and is fully detailed by the learned reporter. It was a case of a bottomry bond given by the master at Calcutta: the condition of the master's obligation therein was, that, if the ship, being fully repaired for the completion of her intended voyage, should within fifteen months set sail, and, barring the perils and accidents of the sea, should duly complete her voyage, the master should pay to the lender the principal and premium at the rate of 12 per cent. before the expiration of thirty days after her arrival; *or in case of the loss of the ship Atlas, then within thirty days next after the account of such loss shall have been received in Calcutta or London.* It professed to be a bottomry bond. When the cause came on for argument, Lord Stowell observed that there appeared to him an objection *in limine* to the entertainment of this suit,—viz., that the bond upon which this suit was founded was not of that species of which the Admiralty Court holds cognizance; for, although such Court has certainly an established jurisdiction over

* 2 Haggard's Admiralty Reports, 48.

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bottomry bonds properly so called, such bonds are founded on sea-risk, and are defeasible by the destruction of the ship in the course of her voyage, on which account alone the high interest is allowed and is supported by the established course of maritime jurisdiction; but the bond recited above was not defeasible by any such casualty: "whether the ship sinks or swims, whether she arrives at her destined port, or is lost in the ocean, it makes no real difference in the bond; for the debt with the accompanying interest continues in full force, and is only slightly affected as to the time of payment by the event of a total loss: the hypothecation goes no further, and would not go so far if not compelled by the necessity of the later intelligence, which must be received after the actual loss of a ship. The bond is absolute without any dependence whatever upon the accidents of the voyage; the debt and the interest thereon must, under any event whatever, be discharged."

The *pretium* cannot be allowed without the *periculum* be contemplated.

The high interest is permitted so that the lender (who in every case of a bottomry bond, properly so called, and not the borrower, is to run the risk) may be properly reimbursed; such interest is denominated *periculi pretium*, or the price of the hazard which the lender incurs. The allowance of such an interest can, therefore, only be justified where such danger is incurred on the part of the lender; and in the *Atlas* the allowance of twelve *per cent.*, which could be exacted in every case, whether the voyage was successful or not, was held not a *periculi pretium*, for danger there was none; and, further, that such a case lay rather beyond the jurisdiction of the Court of Admiralty, although it appeared that, in the East Indies, such bond would be denominated a hypothecation bond. *Per Cur.* "But it being so denominated there, will not make it such in the view of this Court, if it does not pledge the vessel

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herself for the sole payment of the bond. Here the bond is absolute. In any event that happens to the ship, the money must be paid. It is, therefore, an absolute and indefeasible bond, at least in the sense which this Court applies to that term. I believe it may be true that some bonds, not exactly conformable to this rule, may have passed by unobserved by the Court, in cases where the parties have both of them come willingly before the Court, and have not drawn its attention to the phraseology of the bond; some such may have passed without observation. I have no reason to think this has happened frequently, but I believe the fact to be, that these bonds are often inaccurately expressed—expressed differently in the style of different countries, but tending to the same point; viz., the dependence of payment upon the safety of the ship. The mercantile capital of *England* is so universally diffused over the whole globe, and *English* credit is so well established in foreign ports, that occasions perhaps more seldom occur, and a less necessity exists for a recourse to such bonds in *English* use, than in the commercial transactions of other nations. But such necessities do occasionally exist, and where they do, this practice, coeval with the *Roman* law, is applied. The existence of such bonds is fully supported by the authority of maritime courts, in every part of the commercial world, as well as of this."

The Court of Admiralty, except upon the subject of prize, exercises an original jurisdiction only on the grounds of authorised usage and established authority.

"If it be said that the ship is the first pledge in this bond, and therefore upon that principle, if it can be so called, the jurisdiction ought to act—I think that is not a principle which will support these bonds. This Court, except upon the subject of prize, exercises an original jurisdiction upon the grounds of authorised usage and established authority. The history of the laws of this country shows full well that such authorised usage and established authority are the only supports

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to which this Court can trust, except in respect to the subject to which I have alluded.

"I feel another strong objection to proceeding further in this case, supposing the question of jurisdiction got over. The transactions are entirely of a mercantile nature, but of a mercantile nature that is almost entirely Oriental; the whole demand from the original outset commences, and I had almost said terminates there. Of such transactions I am a very insufficient judge,—what expenses were proper to be incurred there—what enterprises to be undertaken—what allowances to be properly made.

The Court of Admiralty is not a general receiver of *derelict* jurisdictions.

"It has been intimated that no other court possesses a jurisdiction that would grant a relief to the complaining party. Taking that to be the fact, it would not supply this Court with authority to proceed, for this Court is not a general receiver, nor is it empowered to entertain *derelict* jurisdictions. The proper result of such defect would be—what I am strongly inclined to recommend—a recourse to a reference to merchants acquainted with the modes of conducting Oriental adventures; for, as far as I can judge, such knowledge is essentially necessary to a right decision of this case. * * * * * * I strongly advise the parties to accede to this recommendation, being confident that they would receive much more expeditious and satisfactory justice therein than could be expected from a court which, omitting all other objections to it, would, from the mere doubtfulness of its jurisdiction, be liable to expensive irruptions."

This proposal or recommendation from the Judge was not acceded to by the parties, and the Court was pressed for its final decision; both parties having consented to the jurisdiction, there appeared to be no fear of a prohibition from the superior courts; and this was urged to the Court; but Lord Stowell, in his final decision,

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dismissed the suit on account of the doubts he entertained respecting the jurisdiction. *Per. Cur.* "The civil law courts have no right to usurp an authority, merely because a common law court does not possess it: it must have a more direct and positive foundation. A court of civil law does not claim to be the refuge for all destitute jurisdictions."

From this sentence, dismissing the suit for want of jurisdiction, an appeal was prosecuted to the delegates. *For the respondents* it was argued much to the effect of the judgment of Lord Stowell, — viz. that the instrument in question was not a bottomry bond; that it was an absolute mortgage of the vessel with an illegal interest; that marine risk is of the nature and essence of these bonds. Quoted Dig. lib. xxii. lit. 2.; Cod. lib. iv. lit. 33.; Bynkershoek, Quæst. Jur. Pri. lib. iii. c. 16. pp. 506. 509.; Pothier, Traité du Contrat d'Assurance, and De Prêt à la Grosse Aventure, vol. iii. c. 1. s. 2. and p. 77. et seq. (Ed. Paris, 1731); Benicke on Insurance, p. 72. et seq.; Abbott on Shipping, p. 487. et seq. (5th edit.); Magens on Insurance, vol. ii. pp. 33. 56. 393.; *Glover* v. *Black*, 3 Burr. 1394.; *Menetone* v. *Gibbons*, 3 T. R. 269.; the *Jane*, 1 Dod. 461.; *Hero*, 2 Dod. 139.; the *Nelson*, Brown, 1 Haggard, 177. In *Ladbooke* v. *Crickitt*, 2 T. R. 649., the Court of King's Bench expressly declined to give an opinion upon the subject of the Admiralty Jurisdiction.

For the *appellants* it was argued to the effect, that there was an object manifest in these transactions to make it a bottomry contract; that it was in the contemplation of all parties that it should be a regular bottomry bond; that instruments are to be construed according to their general intent, and bonds of this description are not considered strictly, and may be good in part and bad in part; that if the ship had been lost, then this condition * of the bond would have come in question;

* Viz., the condition printed in italics at p. 68.

but the ship being safe, it is only the good part of the bond which is before the Court; and, further, it was argued that if there be no sea-risk, still it is a good bottomry bond. Cited *Tartar*, 1 Haggard, A. R. 13.; *Augusta*, 1 Dodson's A. R. 283.; *Sansum* v. *Bragginton*, 1 Vesey, 443.; *Bridgeman*'s case, Hob. 11 Moore, 918.; *Scarborough* v. *Lyons*, Latch. 252.; *Corset* v. *Husley*, Comb. 135.; *Benzen* v. *Jeffries*, 1 Lord Raym. 152.; *Johnson* v. *Shippen*, 2 Lord Raym. 982., 1 Salk. 35.

The Court directed a search to be made whether any cases could be found in which the Court of Admiralty had entertained a suit upon a bond professing to be a bottomry bond, but which excluded sea-risk: five bonds of such nature were produced, but it was admitted that not one had been brought to the notice of the Court of Admiralty, and were not relied upon as adjudged cases.

Then the Court directed the question to be argued, Whether the amount of interest reserved in the bond under consideration was not more than legal interest? and the Court held that maritime *interest* was contemplated, and that, as the bond excluded *sea-risk*, it was void; and the sentence of the Admiralty Court was therefore affirmed.

In the case of *Simmonds and another* against *Hodson*, originally in the Common Pleas*, the master of a ship borrowed money and gave a bond, in which he bound himself, the ship, &c. for the repayment of the money advanced with 12*l.* per cent. bottomry premium; and he further bound himself, ship, &c., to the payment of that sum with all charges thereon "in eight days after *my arrival* at the port of *London*; and *I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the port of London*, in preference to all other debts or claims, declaring that this pledge

* Reported 6 Bingham, 114.

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of bottomry has now, and must have, preference to all other claims and charges until such principal sum with 12*l.* per cent. bottomry premium and all charges are duly paid:" it was held in the Court of Common Pleas that, as plaintiff's claim did not depend on the risk of the voyage, it was not bottomry. But in the Court of Queen's Bench* in the same case in error, it was held that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage: that the words *my arrival* must be understood to mean *my ship's arrival;* and that the words "I make liable the said vessel, her freight and cargo, whether she do or *do not arrive at London,*" were intended only to give the lender a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of a loss of the ship; so that, although the decision in the Common Pleas was overruled in the King's Bench, the principle was not departed from that there must be risk: in delivering judgment, Lord Tenterden said, no person can be entitled to it (maritime interest), who does not take upon himself the peril of the voyage.

Although upon this subject the Court of Admiralty has not been frequently called upon to decide, it is satisfactory that it has been supported by the decisions of the courts of common law, and that its opinion has not been overruled in denying the aid of its jurisdiction, where the bond excludes the very risk for which alone so large an amount of interest could be upheld.

So in the *Emancipation* †, a late case in the Admiralty Court, a bottomry bond had been given, in which there was a total absence of any maritime risk, either express or implied, in the body of the instrument,— there were

* 3 B. & Adol. 50.

† 1 W. Robinson's Admiralty Reports, 124.

no words from which an inference could be drawn that any maritime risk was intended: such intention could not be inferred from the word hypothecate alone; for that is an ambiguous expression, and may mean bottomry or mortgage; nor could it be inferred from the rate of interest for which the stipulation was made, being only 6*l.* per cent., the legal rate of interest in the Bahama Islands, where the bond was executed: for, although it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is, that the advance of the money was attended with risk, it is a material circumstance that only an ordinary rate of interest should be demanded. It is impossible to conceive that any merchant carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money but a bottomry bond, and ask no greater emolument than the ordinary interest of 6*l.* per cent., if the repayment of such loan was to depend upon the safe arrival of the vessel at the port of her destination after performing such a voyage.

Although it is not absolutely necessary that a bond should carry maritime interest, still such may be a material circumstance to show that no risk was contemplated.

The rule of law, that the meaning of written instruments must be construed by the tenor of their contents alone, is strictly applicable to cases of bottomry; and as, in the case mentioned above, the Court could not come to the conclusion from the words of the bond, or from legal inference from its contents, that maritime risk was included, whatever might have been the intention of the contracting parties; or, assuming that it was their intention to give a good and valid bottomry bond, still, as it did not appear, either in express terms or by necessary inference from the contents of the bond itself, that the payment of the money advanced depended on

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the safe arrival of the ship, it was held that the Court of Admiralty had no authority to pronounce in favour of its validity.

Court of A. has jurisdiction if a bottomry bond be given, if even the ship has never put to sea.

It may be mentioned here, that upon the authority of the *Aline**, the Court of Admiralty has jurisdiction, if a bond of bottomry should be given, where even the ship has never put to sea; for otherwise many questions must suggest themselves in which consequences would arise wholly inconsistent with justice, and highly disadvantageous to the general interest of commerce; for instance, a foreign vessel might arrive in a port of this country, the master of that vessel might take up money upon bottomry, and, by refusing to proceed on his voyage, might divest the British bondholder of all remedy for his bond.

And also where a mere agreement for a bond has been entered into.

The same case is an authority to the effect that the Admiralty Court has jurisdiction where a mere agreement for a bond has been entered into but no bond has been actually given, for the same reasons; and further, that, if it had not jurisdiction, a bond-*holder* † who had advanced his money upon the faith of an agreement for a future bond, might be equally defrauded and deprived of his remedy by the master's refusal to execute the bond for which he had stipulated.

There is no other decision in the Admiralty Court in which either of these questions has been judicially determined; but the above reasons were given by the present learned Judge of the Court, in which an agreement for a bond attended with the circumstances mentioned above was upheld.‡ And where, in a very recent

* 1 W. Robinson's Admiralty Reports, 111.

† *Sic* in the Reports; but can such a person be termed a bond-*holder?*

‡ That case contains an important decision by Dr. Lushington as to what lien a suitor in a cause of damage has on the ship doing the damage, with reference to *prior* claims of a mortgagee or bondholder, or with reference to repairs effected or money advanced on bottomry or otherwise *subsequently*.

case in the Admiralty Court, money had been taken up on bottomry in this country, the vessel being foreign, and the bond bearing a premium of 15*l.* per cent. payable upon her arrival at the United States, the ship having loaded &c., set sail, but was obliged to put into Plymouth, and was lying there unseaworthy, and, as she could not be repaired, was unable to proceed to her port of destination; it was held that the vessel having been arrested, the Court of Admiralty could enforce the bond; and the learned Judge also reiterated the opinion given in the *Aline*, viz.,—That a case of a ship not leaving port is one of those in which the Court would feel bound to exercise its power, by reason that, where money has been advanced on bottomry and the bondholder is precluded from the completion of the agreement by the act of the master, or by some impossibility which the bondholder cannot control, the advance upon bottomry ought not be converted into a debt on personal credit. But "where no risk was incurred," said the learned Judge, "I should be inclined to hold that no maritime interest was due." But as, in this case, a part of the risk had been incurred, and the further risk was intercepted by the calamity of the vessel's becoming unseaworthy, the interest could not be severed, and the bond was pronounced for.* And where the condition of a bottomry bond was, that if a bill drawn by the master in favour of the bondholders should be paid; or if the master should discharge the amount with interest within twenty days after the arrival of the ship in any port of *Great Britain;* or if the ship be lost, then the obligation to be void: and upon the ship putting into *Portsmouth*, she was arrested by the bondholders before the expiration of the twenty days, and the owners appeared under protest, contending

* The *Dante*, 4 No. Ca. 408.

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that, as the arrest was made before the bond was due, they ought to be dismissed. *Lord Stowell* overruled the protest; for it was alleged, on the part of the bondholders, that the ship was going to leave the kingdom, and that averment was not denied by them.*

Material-man has no lien by the law of England.

There are many cases which will be subsequently considered, in which persons supplying a ship with necessaries (in the diction of the Admiralty Court, known as *material-men*) have the benefit of a lien on the ship. By the law of many maritime states this privilege exists, but not by the law of England †; although, if he have actual possession, he may retain it till his debt be paid; as, for instance, a ship builder having the ship in his own dock, &c. By the ancient civil law, and by that of many foreign countries, a material-man may take the ship into his possession until the debt be paid. It has been decided, that the fact of a lien on the ship, existing by the law of the country in which a bond has been given, when the ship was about to sail, furnishes a presumption in favour of its being a pure bottomry transaction; and not a loan on personal credit. ‡ But where a bond has been given to secure advances originally made upon the personal credit of the owner, the lenders must abide by the consequences

* The *Jane*, 1 Dodson's Admiralty Reports, 461.

† By the new statute relating to the Admiralty Jurisdiction, by which such jurisdiction is extended to cases of foreign ships supplied with necessaries in this country, no lien, properly so called, is conferred upon the material-man. The statute does not create a lien upon the vessel at all: the debt has no foundation upon the statute. It simply confers upon the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise for enforcing the payment. The proceeding against the ship is only one way: it might be by arresting the person of the owner, if he were resident here, or by arresting the property in case a necessity occurred. See the *Alexander*, 1 Wm. Robinson's Admiralty Reports, 294.

‡ *Vibilia*, 1 W. Robinson's Admiralty Reports, 1.

of their own indiscretion, and they cannot engraft a bottomry bond upon money advanced in that manner; for, although by the law of the country in which the advance is made, there may exist a lien or right to retain the ship, still where money &c., is furnished on the personal credit of the owners, and not upon the security of the ship and freight, the ship cannot be made subsequently liable*; but where there has been no advance on personal credit, although the law of lien may exist in the place where such advance is made, the fact of that advance being so privileged will form an important ingredient in favour of a presumption, that it was made on the credit of the ship; and that, when she is about to sail, a bottomry bond is essential to the lender's security; and the Court of Admiralty has authority to enforce such bond.† A judicial opinion has also been given by the present learned Judge of the Admiralty, that small advances and minute items, without direct evidence, as to any original understanding or contract as to the nature of the lender's security, but followed by a bond of bottomry, may be included in such bond.‡

Advances on personal credit cannot be made the subject of a bottomry bond;

but where advance has been made in a country where the law of lien exists, such advance may be the subject of a bottomry bond.

But it becomes necessary that the principle of the rule that a transaction on personal credit cannot be converted into bottomry, should be further illustrated:

* See the *Augusta*, 1 Dodson's Admiralty Reports, 283., where an attempt to convert a transaction of personal credit into a bond of bottomry, was not supported, although the law of lien existed in the country where such advance was made.

† The *Alexander*, 1 Dodson's Admiralty Reports, 280. The *Vibilia*, 1 W. Robinson's Admiralty Reports, 1. The distinction between the *Augusta* and the *Alexander* is this, that in the former case an attempt was made to convert an advance on personal security into a bottomry transaction; in the latter the advances were made on the security of the ship on the faith of a lien existing by the law of the country where the transaction was made, and that a bottomry bond was resorted to, a special hypothecation being then necessary before the ship left such country.

‡ *Vibilia.*

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the principle being that no man shall have a right to alter a contract into which he has already entered without the consent of the other party, and to his prejudice. The following are some of the forcible observations of the present learned Judge on this subject. No man can alter a simple contract debt into a bond debt by his own sole act and deed. He has chosen his security, and by that he must abide. For the same reason, he who has advanced money for the use of a ship on personal credit cannot demand a bottomry bond, and therefore, if a person advance his money on personal credit, or do repairs, or furnish necessaries on such credit, then he cannot take a bottomry bond for what he has advanced on personal credit: but the master may borrow of any other person on bottomry the money requisite to pay such debts and to fit his vessel for sea, and this without any reference to any power of the credit to arrest the vessel according to the *lex loci*. *Per Cur.* "Would it not be contrary to all principles of justice and equity, where debts had been *bonâ fide* incurred on account of the ship, to prohibit the lending of money on bottomry to pay those debts, yet allow it to be so lent for the mere purpose of clearing the ship, leaving the creditor, in Sydney or elsewhere, to follow the master or owner to England for his money? I think it would. If such were the rule, how would it operate on the interests of ship owners? Why they must furnish credit at every port to which a ship is destined; and who would trust a master? Would this assist commerce? Would such a rule tend to advance the completion of voyages of this very description? If the ship could not be detained, might not the master be detained in all ordinary cases, and how is the ship to proceed then? Would the owners have any reason to complain? The debts to be paid must be the proper and just debts of the ship, for which they ought to have

If a person advance money on personal credit, he cannot take a bottomry bond for it; but the master may borrow *of any other person* on bottomry the money to repay such debt.

provided; and if they did not, or the master abused his trust, who is to suffer? the innocent creditor, or the principal for the acts of his own agent. The utmost possible extent to which the objection could go would not affect the validity of the bond itself: it could only lead to the disallowance of specific items."*

A bottomry bond may be good in part and bad in part, and the Court of A. may reduce the premium; but such control is exercised with great caution.

It has been mentioned before that, by the practice of the Admiralty Court in proceedings on bottomry bonds, the Court may pronounce a bond to be good in part and bad in part; so also it has been judicially determined that the Court of Admiralty has jurisdiction to reduce the premium on bottomry bonds. But it is obvious that such control is exercised with great caution. Lord Stowell is reported to have said in the *Zodiac*†: "I have endeavoured to find in the authorities, ancient as well as modern, the regulations, if any, which have been allowed to courts in restraining any exorbitance of maritime interest. But I do not find any, either in more ancient writers, or in the later authorities, such as *Emerigon* and *Pothier*, and the modern writers upon maritime and commercial law. There have been a few instances, though a very few, in which this Court has exercised, with great caution, a control, in the way of a reduction of the stipulated interest where it appears exorbitant, and I think it rather difficult to say that no such power exists. The contract, even if made by the owner himself, may be a contract made under an undue advantage taken of his distress. But it is generally not made by the owner, but by the master, who represents him, and not by special appointment of him for that purpose, but only by the operation of law acting upon an emergent and unprovided necessity; probably sometimes incurred not with the greatest prudence, considering that it is to impose the

* *Hebe*, 4 No. Ca. 361.

† 1 Haggard's Admiralty Reports, 320.

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payment of an obligation upon another person, and therefore, where there is a manifest want of such prudence, it requires some degree of correction. At the same time, a court in a distant part of the globe can form only an imperfect measure of the distress existing, and of the difficulty of obtaining the needful supplies at the place where they are furnished. The money is to be advanced for persons unknown and resident in a foreign country: it is to be advanced upon an adventure which may totally fail of success, and the money may be irrecoverably lost. Upon all these considerations, a court should be inclined to take the agreement as it stands, and not to disturb it unless it be somehow vitiated by the party who objects to it. There may be cases where there are manifest errors in the calculation, or in the basis upon which it has been made, that may call for correction. But the presumption is in favour of the original contract. The present case is undoubtedly distinguished by some special circumstances, and, in particular, that the bond is given for the services of a *British* consul. Such an item I do not remember in any bottomry transaction; but I am not prepared to say that it may not properly be incurred. He cannot be compelled to advance money, nor without adequate security. If, then, he is not obliged to furnish advances, I cannot say that they may not find their way into a case of bottomry. The necessity of the case will justify what that necessity may require."

The Court of A. has the same authority if even the hypothecation has been in a *foreign* port, and the money advanced by a foreigner.

It appears from the case already cited, the *Aline*, that the Court of Admiralty will exercise the power of reducing the interest without reference to whether fraud and collusion are or are not imputed; and not only in cases between *British* subjects, and where the vessel was in a *British* port, but also where the hypothecation has been in a foreign port and the premium or money advanced by a foreigner. In the

Cognac * it was contended, for the bondholder, that the Court had no authority to reduce the premium on a bottomry bond, unless specifically affected with fraud and collusion, which must be shown and proved in a clear and distinct manner. But the Court (Sir Christopher Robinson) pronounced for his jurisdiction; for the power which the Court of Admiralty exercises in these cases does not rest on any direct authority which it assumes over a foreign contract, but on the principle common to all courts, which restrains them from lending their aid to enforce contracts essentially vicious, or tainted with fraud or extortion. If, therefore, fraud or collusion might justify the interference of the Court of Admiralty, those terms must be taken with the extension given to them in other courts; and if the Court of Admiralty is required to enforce contracts of this kind at all, it must be on such principles as equity demands, and without which neither equity nor justice would be done. "We have then, I think, sufficient authority for the exercise of this jurisdiction, on the same principle in all cases, foreign as well as domestic.† It cannot be said, therefore, that there is any surprise on foreign merchants in the application of such principles; and it must be understood, as they do undoubtedly understand, that if they require the aid of this Court, to enforce contracts made intentionally to be enforced here, such aid can only be

* 2 Haggard's Admiralty Reports, 377.

† Sir C. Robinson quoted in the *Cognac* a remark made by Lord Hardwicke in *Chesterfield* v. *Jansen*, 1 Atk. 352., in the following words: "To take advantage of another man's necessity is equally bad as taking advantage of his weakness, and in such situation he is as incapable of making a right use of his reason as in the other; and fraud has been constantly presumed or inferred from circumstances and the conditions of the parties; from weakness and necessity on one side, and extortion and avarice on the other, and merely from the intrinsic unconscionableness of the bargain."

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afforded according to the principles which guide its proceedings, and without which it would be an instrument of fraud and rapine, rather than the dispenser of justice."

The jurisdiction of the Court of Admiralty to reduce the premium on bottomry does not depend on this case alone, which clearly establishes that the Court possesses jurisdiction on the subject matter: for in the *Heart of Oak* *, the present learned Judge of the Admiralty, in acknowledging the authority of the *Cognac* in this matter, remarked further: "Possessing this jurisdiction it would, I conceive, be inconsistent with equity (and this Court sits as a court of law and equity) that the Court should decline to interpose its authority to reduce the premium when the rate of interest is excessive."

But, together with the preceding, it should be observed, that the Court, in the exercise of this power, would act with great caution, and each case of that kind would be subject to a minute consideration of its particular circumstances; for, "to reduce the premium is a high act of judicial authority†;" for "bottomry bonds have always been regarded as matter of serious obligation, protected by the terms of agreement between the lender and the borrower: nothing else is looked to but what the lender demands, and the borrower agrees to: nobody has a right to alter that agreement. The demand so agreed to is the true measure of the contract, and cannot be altered or modified by either party."‡ The case from which the preceding is extracted, was one in which the bond was fully submitted to; but the party who was to pay claimed a reduction, on account of an usual reduction which takes place in payments of an

* 1 W. Robinson's Admiralty Reports, 215.

† *Cognac.*

‡ *Per* Lord Stowell in the *Jane Vilet*, 2 Haggard's Admiralty Reports, 92.

ordinary kind. It was stated on affidavit, "that it was the constant custom to reduce the *Newfoundland* sterling money when payable in *Great Britain* into *British* sterling money according to the rate of exchange between the two places." The Court declined to make such deduction. "The extent of the necessity is measured in the original contract, and cannot be reduced by rules that apply to cases of ordinary negotiation: no such right exists, and it cannot be extended to a contract of so sacred a character."

We have now seen with what a high hand bonds of this nature are upheld in the Admiralty Court. It must also have been so obvious to the reader, how much the interests of commerce and navigation demand that they should be so; how much it is necessary that, when the money is furnished by the lender, upon whom is devolved a risk of more than ordinary nature, his interest should be well protected, and when the ship has arrived at her destination, and has thus profited by his advance, he should abandon all care and solicitude, with the conviction that the Court of Admiralty will protect his interest, and, by the fixed and invariable principles by which it is governed, pronounce for the prize which is due to him for his insecure and riskful loan. This is a subject too obvious to require extension or repetition.

So far bonds of this nature have been cited in the Admiralty Court to be of a high and *sacred* character. "Bonds of hypothecation are of a very high and privileged nature: they were invented for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports, where the masters and owners are without credit, and where, unless assistance could be secured by means of such an instrument, the vessels and their cargoes must be left to perish. It is important, therefore, to the interest of commerce, that bonds of this kind should be upheld with a very

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strong hand, and accordingly they have at all times been so upheld by this Court where they appear to have been entered upon *bonâ fide*, and without any suspicion of fraud." *

As these words "high and sacred character" have frequently been abused by a misapplication of their true meaning and intention, the following qualification or explanation of them by Dr. Lushington is inserted here, not only because it is a most valuable elucidation of the terms made use of, but also because it refers and brings us naturally to the subject about to be discussed. "It may not be unadvisable," said that learned Judge, "to consider what is meant by that dictum so often cited, and again urged in this cause †, that bottomry bonds are of a high and sacred nature. All legal engagements, all contracts sanctioned by the law, are sacred; that is, they are to be enforced by every court of law and equity: the expression, therefore, so often repeated must, I think, have some other meaning more appropriate and peculiar to the subject itself than merely to denote the character which a bottomry bond enjoys in common with other legal instruments.

"I may also further observe, that this expression, so often quoted, cannot refer to priority of payment, for of that, when the bond is admitted to be valid, no doubt is ever entertained. The only meaning which, with satisfaction to my own mind, I can attach to this observation is, that where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond in all essentials apparently correct, then, that under such circumstances, the strong presumption of law is in favour of its validity; and it shall not be

* *Per* Lord Stowell, 1 Dodson's Admiralty Reports, 278.

† The *Vibilia*, 1 W. Robinson's Admiralty Reports, 1.

impugned save when there shall be a clear and conclusive evidence of fraud: or where it shall be proved beyond all doubt that, though purporting in form to be a bottomry transaction, the money was, in truth and in fact, advanced upon different considerations.

"And it appears to me, that this view of the question is confirmed by the very nature of bottomry transactions. There must be in all such transactions the act of the master, the agent of the owner, evinced by the execution of the bond, and the presumption is, that he would perform his duty honourably, and not unnecessarily subject the property of his principal to heavy burthens. Again, the transaction taking place in distant countries, where it may be often difficult for the foreign merchant who advances on bottomry to furnish adequate proof as to all parts of the *res gestæ*, this furnishes another reason for presumption in favour of a bond necessarily signed by a master. It is for the general advantage of the shipping interests of the world, that bottomry transactions should not be rendered too difficult; and in ordinary transactions of this kind there is less reason to complain, because the interests of the owner can never be affected, save, as I have already observed, by the act of his own selected agent, except, indeed, in the few cases of the original master no longer having the command." *

In no case, then, can the Admiralty Court be called upon to uphold a bond of this nature, where it is attended with fraudulent circumstances, be the same executed in ever so formal or apparently effective a manner; and it is to be presumed that the misapplication of this dictum respecting their *sacred* character, is the reason for which the Court of Admiralty has in some instances been restrained from entertaining the

* See also the *Mary Ann*, 4 No. Ca. 378.

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question where the transaction is at all tainted with fraud; although it is not necessary to observe, that, from the proof of necessity, which is required in that Court, no case could arise in which such a bond could be pronounced for; but the Court of Chancery has, by injunction upon an averment of fraud, restrained the Admiralty Court from proceeding in a cause of bottomry.*

On an application for an injunction from the Court of Chancery to restrain the Admiralty Court from proceeding in a cause of bottomry bond, by reason that it was attended with suspicious circumstances, Lord Cottenham is reported to have said, that "the proceeding in the Court of Admiralty is to enforce a legal right; and the only answer suggested to that is, that the Court of Admiralty has a power which a court of law does not exercise over an instrument of this nature,—namely, a power of permitting it to take effect to a limited extent, and of disallowing sums of money not properly forming the subject of a bottomry bond. The Court of Admiralty, however, so far as I am aware, possesses no jurisdiction, and none such has been asserted, enabling it to exercise the power which this Court exercises over the instrument itself, for the purpose of setting aside that which ought never to have existed, so as to prevent any validity being given to an instrument which originated in fraud. But, whether the Court has or has not such a jurisdiction, it is not because another court has concurrent jurisdiction, that the Court is to be stayed, particularly in a case like the present, where the proceedings in this Court were instituted first, and where the question is, whether this Court, having acquired jurisdiction over a subject-matter, peculiarly within its jurisdiction, is to abstain

* *Gascott* v. *Laing*, 3 Mylne and Craig, 451., and 8 Sim. 358.; see also *Dobson* v. *Lyall* in note 453., 3 Mylne and Craig.

from exercising that jurisdiction, because afterwards proceedings are instituted in another court, which may or may not have jurisdiction." In the subsequent case of *Duncan* v. *M'Calmont* *, a vessel was arrested in the Admiralty Court in a cause of bottomry; but application was made to the Court of Chancery to restrain the Admiralty Court from proceeding, on the suggestion that the transaction was fraudulent, and of such a nature as to be open to the greatest suspicion, and, therefore, that an opportunity ought to be given to have it fairly investigated. Lord Langdale, having recognised the power of the Admiralty Court, restrained that Court from continuing with the suit where the transaction was alleged to involve fraudulent circumstances. "It does not appear," said his Lordship, "that the Court of Admiralty can so conveniently, directly, and effectually as this Court can, compel the defendants to do all that is necessary for the full and satisfactory investigation and determination of the rights of these parties." It was further remarked by his Lordship, that, "the proceeding being by act on petition †, the investigation could not be properly conducted. Conceiving that, upon a proper case being made out, and upon certain terms, the form of proceeding in the Admiralty Court might even now be altered and made more effective for the investigation of such a case as this, it is, I think, sufficient for me to say, that the proceedings in the form now adopted cannot be well adapted to a case which appears to me to require evidence, which it might be wholly impossible to obtain on affidavit." ‡

* 3 Beavan, 409.

† Described by Lord Stowell as a "summary mode of proceeding, in which the parties state their respective cases briefly, and support their statement by affidavits, a form convenient enough in matters of slight interest, and not of very delicate investigation."

‡ This judgment was affirmed by the Lord Chancellor.

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Since the decision of these cases, the power and jurisdiction of the Admiralty Court has been most considerably extended; and it is important to observe, that the limited power which the Admiralty formerly possessed was a material circumstance in favour of the interposition of the Chancery Court, but more particularly in the latter case. That a bottomry bond, which is attended with circumstances involving fraud, could not have been pronounced for in the Court of Admiralty, it is not necessary to repeat; but the limited power which that Court formerly possessed to enable it to determine whether there was fraud or not, may have made the injunction from the Court of Chancery a great benefit to the defendant who wished to impugn its validity. The authority now given to the Admiralty Court by the new statute, and by which a case of fraud or no fraud could well be determined, is so considerable as to render a further extension of this subject useless.*

In bottomry cases the Court can decree a sale of the ship.

In treating of the jurisdiction of the Admiralty Court in causes of possession, it has been remarked that the Court has not the power to decree a sale of the ship, even at the instance of a majority of the owners; but this does not apply to cases of the nature of these now under consideration; for in all cases of bottomry and salvage, and also in claims for wages which are brought before it, the Court of Admiralty possesses an undoubted power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied. The jurisdiction of the Court in these matters is confirmed by the municipal law of this country, and by the general principles of the maritime law; and the title conferred by the Court in the exercise of this authority is a valid title against the

* See the statute 3 & 4 Vict., printed in the Appendix.

whole world, and is recognised by the courts of this country, and by the courts of all other countries.*

A mortgagee may appear to impugn the validity of a bottomry bond.

What has been said with reference to the limited power of the Court with respect to mortgagees does not apply in any manner to causes of this nature; for a mortgagee may appear to impugn the validity of a bottomry bond; and a distinction does not appear to have been made, as to whether such mortgagee was mortgagee in possession or not, in the *Mary Ann.*† The present learned Judge of the Admiralty remarked that the defendants (opposing the validity of the bond) were alleged to be mortgagees in possession: "when in possession, or how in possession, I do not distinctly understand, nor what effect is intended to be derived from the alleged fact of possession; nor did I observe that such fact was relied on in argument. I apprehend that, as mortgagees, the defendants have a right to impeach the validity of the bond to the same extent, and in the same manner, as the owners, subject, perhaps, to some distinctions in peculiar cases. But it is of importance in this and all similar cases to remember that the title of mortgagee is a title derived from the owners, and in no respect, as I conceive, superior thereto."

Bond on the cargo only.

A subject which has not yet been considered, is, that of a bond being granted upon a cargo alone. It is hardly necessary to observe that the giving of such a bond is a very unusual circumstance; but in a very recent case in the Admiralty Court, among other bonds, one on the cargo alone was upheld; and the learned Judge observed in that case, — "It is very unusual to grant a bond upon the cargo only: I do not recollect one single case within my own time of such a bond. Apparently, from the judgment of Lord Stowell in the '*Gratitudine,*'

* *Per* Dr. Lushington in the *Tremont*, 1 W. Robinson's Admiralty Reports, 163.

† 4 No. Ca. 382.

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there were such bonds in former times; but this is not very clear." The validity of the bond was not questioned in this case; but it was laid down that, as all expenses incurred in cases of bottomry are expenses relating to the ship itself, the cargo can never be made liable in the Court of Admiralty to any part of those expenses until the value of the ship and freight has first been applied in liquidation of such demands. The reasons given by the learned Judge were, that, as the expenses were incurred in the repair and refit of a vessel, they are expenses properly falling on the owner of the vessel, and that as they are expenses for the benefit of his property, therefore the ship and freight ought to be first applied in liquidation of them. The cargo can never be hypothecated for the benefit of the ship, *i. e.*, for the purpose of exonerating the ship from any part of the burthen properly belonging to her, and which the master ought to have defrayed on the part of the owners if he had had funds: the cargo can be hypothecated only where the lender requires such security, and only to the extent of any deficiency in the proceeds of the ship and freight to pay the money advanced. The judicial determination in this case is confirmed by the authority of Lord Stowell, who, in the *Gratitudine**, said that, "if it were to happen that the ship and freight were omitted in the literal terms of the bonds, they would be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind."

In the *Gratitudine*, the bond was on the ship, freight, and cargo; and it was admitted that the ship and freight were first liable; but it was contended that the master had no power to hypothecate the cargo. But it is now clear that the master has power to hypothecate

* 3 Robinson's Admiralty Reports, 240.

the cargo. But the cargo cannot be made liable till the proceeds of the ship and freight have been exhausted, and this though the bond does not mention the ship or freight, or the bondholder attempt to render them liable; and that, by the law of the Admiralty Court, where a bond is given affecting a cargo, the ship and freight, whether named in the bond or omitted, must, in the first instance, be applied in satisfaction of the bond, and this whether the bondholder desire it or not.* Where there are several bonds, one on the ship and freight, and another upon the ship, freight, and cargo, the Court of Admiralty will exercise its equitable jurisdiction, will marshal the assets, and satisfy one claim from the cargo, another from the ship and freight, &c.†

SECTION II.

Incidental to questions of bottomry bonds or advances of money on the credit of the ship, are those questions of repairs, and necessaries done and furnished on the like credit, and for the payment of which the ship is liable. Under this title, therefore, it remains for us to consider how far the Court of Admiralty has jurisdiction to satisfy and enforce such claims in that respect.

By the Roman law, any person who had either fitted out, repaired or furnished necessaries for the employment of a ship, or lent money for such purpose, had a privilege or claim prior to other creditors upon the ship itself, without any express contract, agreement of the nature

* The *Constancia*, 4 No. Ca. 512.; in that case the learned Judge expressly disclaimed giving any opinion as to the law, if the very extraordinary case of a bottomry bond on the freight only should arise, no such a case having yet occurred.

† See the *Trident*, 1 W. Robinson's Admiralty Reports, 29.

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of hypothecation or otherwise; such repairs or necessaries furnished were, in fact, in all cases an actual hypothecation of the ship itself.* Among all nations who have adopted the civil law as the basis of their jurisprudence, this privilege still exists; but by the law of England it is not so; for the law of England has not adopted this rule of the civil law with regard to repairs and necessaries furnished here to British ships in *England:* for, although Lord Mansfield in two cases in the King's Bench †, has remarked to the effect, that a person who supplies a ship with necessaries has not only the personal security of the master and owners, but also the security of the specific ship, this doctrine has been in numerous instances more than doubted, and overruled, at least as to its general application. "In most of those countries governed by the civil law, repairs and necessaries form a lien upon the ship herself. In our country the same doctrine had for a long time been held by the maritime courts; but after a long contest it was finally overthrown by the courts of common law, and by the highest judicature of the country, the House of Lords, in the reign of Charles II." ‡

Lord Tenterden, in his work on Shipping, says, with reference to the dicta of Lord Mansfield, as follows: — "In a recent case to which I have more than once had occasion to refer, Lord Kenyon, alluding to two cases that will be presently mentioned, expressed a doubt whether the doctrine of Lord Mansfield on this subject

* *Qui in navem extruendam vel instruendam credidit vel etiam emendam, privilegium habet—quod quis navis fabricandæ vel emendæ vel armandæ, vel instruendæ causâ vel quoquo modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum.* Dig. 42. 5. 6., and Id. 134.

† *Rich* v. *Coe*, Cowper, 636., and *Farmer* v. *Davis*, 1 Ter. Rep. 109.; Abbott's Shipping, p. 142.

‡ *Per* Lord Stowell in the *Zodiac*, 1 Haggard's Admiralty Reports, 320.

was not too generally laid down *; and upon the view of the decisions which I am about to quote, one of which was pronounced by Lord Mansfield himself, it appears that the law of England has not adopted this rule of the civil law with regard to repairs and necessaries furnished here in *England*. A shipwright, indeed, who has taken a ship into his own possession to repair it, may not be bound to part with the possession until he is paid for the repairs, any more than a tailor, smith, or other artificer, in regard to the object of his particular trade †, unless there be a special agreement to give credit for a certain period, or such an usage in the trade as is equivalent to a special agreement. ‡ But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not, by the law of *England*, preferred to other creditors, nor have any particular claim or lien upon the ship itself, for the recovery of their demands." §

The authorities here cited are quite sufficient to make it beyond a doubt, that, if a shipwright retains the possession of the ship, he has a priority or lien (the privilegium of the Roman law above alluded to), and can maintain such possession against other claims upon the ship ‖; for in the case of *Franklyn* v. *Hosier*, sent by Lord Eldon for the opinion of the Court of King's Bench upon that point, the certificate of the Court of King's Bench was to this effect: "That the shipwrights, having the ship in their actual possession in their dock

* *Westerdall* v. *Dale*, 7 Term. Rep. K.B. 312.

† Bland, *ex parte*, 2 Rose, 91.; *Franklyn* v. *Hosier*, 4 B. & A. 341.

‡ *Raitt* v. *Mitchell and another*, 4 Camp. 146.

§ See Hill, *ex parte*, 1 Maddocks, 61.

‖ See the *Harmonie*, 1 W. Robinson's Admiralty Reports, 178., how far such material-man has right to retain possession against Admiralty Court.

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at the time of the owner's bankruptcy, had a lien upon the whole ship." In the style of the Court of Admiralty, persons so furnishing or constructing different materials of ships, such as shipwrights, sail and rope-makers, &c., &c., bear the appellation of material-men. Those are commonly called material-men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind)." * It is beyond doubt, that although material-men have now no lien on the ship without possession, and consequently the Court of Admiralty cannot now interpose by its proceedings against the ship on behalf of such material-man where he has parted with possession, still this was not the case in the earlier ages of our system of jurisprudence; and, as among the other rules of Roman law, the one mentioned at page 93. was adopted by the law and practice of the Admiralty Court, so were there many suits in that Court for building, repairing, and victualling a ship in this country against the ship itself, and not against any party by name; but, however much such proceedings against the ship were formerly entertained in the Court of Admiralty, applying the rule of law that a material-man had a lien on the ship itself, in later times the Admiralty Court has been prohibited from entertaining such suits with respect to proceedings by material-men for necessaries furnished to British ships in England; and, since the beginning of the reign of Queen Anne, the Court of Admiralty, in deference to the decisions of the superior courts, has never attempted to proceed *in rem* against the ship itself in such respect. The two latest cases in which material-men attempted to prosecute in the Admiralty Court their demands against the ship, are those of *Hoare* v. *Clement* † and *Justin* v.

* Sir L. Jenkins, cited in the *Neptune*, 3 Haggard's Admiralty Reports, 129.

† 2 Showler, 342.

Ballam *; and in both cases a prohibition was granted. In the former case, decided in Hilary term of the 35th and 36th years of the reign of Charles II.†, a material-man proceeded in the Admiralty Court against a ship, and the master, the late owner, and one Hoare, the present owner of her; a prohibition was granted from the King's Bench as to the ship and owner Hoare.‡ In the other case, decided in Michaelmas term of the first year of the reign of Queen Anne §, a person who had supplied necessaries to a ship at Ratcliffe upon the river Thames, proceeded against her in the Admiralty Court; a prohibition was granted and it was thus ruled: It does not appear in this case that the ship was in her voyage, when she became in distress for want of the materials supplied, and at the time of the contract. There was no hypothecation here as there was in the case cited. ‖ Now where there is an hypothecation, if the Admiralty should be prohibited to proceed, &c., the party would be without remedy, for no suit can be against the ship at common law upon it. Now, it is true, that by the maritime law, every contract with the master of a ship implies an hypothecation, but it is otherwise by the law of England. Therefore, this being a contract made with the master upon the land, it is the common case.

It should further be mentioned, that in those cases of

* Salkeld, 34., and more fully in 2 Lord Raym. 805.

† 2 Show.

‡ See the previous authorities cited in this case in argument for prohibition. Lord Tenterden in his book on Shipping, in reference to this case, says: "It seems the prohibition would have been general, if the master and former owner had applied for it, for the Court of Admiralty had no jurisdiction over the person in this case."

§ Salkeld, 34., and more fully in 2 Lord Raym. 805. According to the present law this suit would have been cognisable in the Admiralty Court, being a foreign ship.

‖ *Costard* v. *Lewstee*, Comb. 135., Holt, 48.

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hypothecation above mentioned, in which the Admiralty Court had no power over the ship, neither has it over the person, either master or owner * of the same, nor has it jurisdiction over the master where the ship is liable; in *Johnson* v. *Shippen*† a prohibition was denied as to the ship, but granted as to the master.

Having, therefore, established that a person supplying materials to a British ship in England, and giving up his lien on the ship by parting with its possession, if he ever had it, has no remedy against the ship, and that the Admiralty has no jurisdiction, it may not be useless to observe upon what principle the old rule of Roman law, or of ancient maritime law has been corrected by the common law of England; whether high considerations of public policy, and the interests of commerce generally have not justified this interposition of the common law. "With respect to ships, great reasons of public policy may, in a country of most extensive commerce and navigation, interpose and induce the application of the municipal law, which prohibits the arrest of the ship, and proceedings against the ship *in specie;* and this was the great principle of the statute of Richard II.; for if every person who supplied any necessary to a ship, had the right at the time to arrest her, vessels would hardly ever be able to sail without paying the uttermost penny, and in many cases would be exposed to the most extortionate demands; they would be liable to be arrested and detained from caprice or malice, and merchants would hardly venture to charter a vessel. This would be a great interruption to the navigation and commerce of the country, and forms adequate grounds for prohibiting the arrest *in specie.*" ‡

* *Leigh* v. *Burley*, 122 Owen. *Cradock*'s case in Brownlow.

† Salkeld, 35.

‡ *Per* Sir J. Nicholl, in the *Neptune*, 3 Haggard's Admiralty Reports, 129.

This interruption to commerce and navigation is the reason assigned by Mr. Holt, in his work on Shipping and Navigation, for the application of the rule in respect of lien on ships, adopted by the municipal law of this country: "The other reasons why ships are not the subjects of such specific liens are, that it would open a door to the manifest mischief of commerce, and would be an impediment to the most valuable article of public and private property, if either the master, for any stores supplied by himself, or any of the dealers with the ship, could arrest the departure of the vessel for accounts afterwards litigated or of small amount; under these principles, therefore, the law of England rejects almost wholly the doctrine of lien as regards ships."

The illustrations given above, naturally bring us to the question as to how far, if at all, the Court of Admiralty has the power to lend its jurisdiction to a person who claims payment from the proceeds remaining in the registry, arising from the sale of a ship under process of that Court, on the ground that he has supplied such ship with necessaries, and to satisfy the claim of such a material-man from those proceeds.

The *John* * was an American ship, and had been proceeded against on the part of the mariners on a demand for wages, and sold under a decree of the Court. The wages had been paid out, and there remaining a surplus in the registry of the Court, application was made on the part of certain merchants of London, for payment out of such proceeds of their demands, which arose from their having supplied the ship with stores, &c., whilst in the river Thames. The master had returned to *America* and died, and the owner was insolvent there; in support of this application, it was said, that actions of this nature had been formerly very frequent; that although in cases of

* 1 Robinson's Admiralty Reports, 288.

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British ships, prohibitions had been granted, that did not apply to *foreign* ships.* Lord Stowell thought such circumstance created a distinction, and after having the cases on this point looked up, said, that he discovered it to be the practice of this Court to allow material-men to sue against proceeds remaining in the registry, notwithstanding that prohibitions have been obtained on *original suits* instituted by them; the case of the ship *Adventure* was referred to in particular, and payment was decreed according to the application. In the case of the same ship, a general creditor or agent, and broker to the ship, applied by petition for payment of his account from the remaining proceeds: the Court rejected the petition, observing that the account was of too general and unsettled a nature to entitle the party to this remedy; that it was a subject more fit for the Court of Chancery, where alone cross demands could be investigated.

The Court of Admiralty, therefore, yielded to the prohibitions of the superior courts, but to the very letter of them — no further — no less: for, having adopted into its code the general principle of Roman law, it was the duty of the Admiralty Court to adhere to it strictly, except, or until informed by the superior courts of law, that considerations of public policy, or other reasonable motives, denied to it the power of applying such principle; and upon those points where such considerations and motives could not possibly be affected, and where also the prohibitions of the superior courts were silent, it still pronounced for its jurisdiction.

It is necessary that these authorities should be minutely stated, by reason of the final contradiction they have received in the Appellate Court.

* For cases of necessaries supplied to foreign ships, see below, p.110.

The *Maitland* *, a Calcutta ship, had been sold in a wages suit, by the authority of the Admiralty Court, and such wages being paid, an application was made on behalf of some material-men, to be paid out of the remaining proceeds; and in support of such application the *John* was cited, and it was argued, that the principle adopted in that case applied to British as well as to foreign ships. *Contra*, Dr. Lushington (the present learned Judge of the Admiralty) argued, that in the *John*, the ship was foreign, and there was no opposition; here the owner opposed the claim, and in such a case there was no real distinction between claims founded upon original suits and proceeds in the registry. The *Court* (Sir Christopher Robinson) having first remarked to the effect that this claim was advanced as an exception to an universal rule, and must be proved by strong authority to justify the Court of Admiralty to pronounce for its jurisdiction, and further observing how necessary was the caution with which this question of jurisdiction should be considered, and the dangers and evils in many respects for pronouncing for it, if unauthorised, continued: — "The authorities (in support of the exception) are very limited; they relate only to proceeds *remaining in the registry*, an ambiguous term, which seems rather to apply to cases where no appearance has been given for the owners, than to cases in opposition to their claims, as in such cases, the proceeds can hardly be said to be *remaining* in the registry, being detained there only by the warrant of the Court, and adversely to the demand of the owner. It may be doubtful what would be the accurate interpretation of these terms, if they could be traced in the cases which have established the exception to a certain degree. In the *John*, which has been cited,

* 2 Haggard's Admiralty Reports, 253.

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there was no opposition, and no argument; and the effect of former practice is stated only in general terms.

"There does not seem to be any solid distinction between original suits, and suits against proceeds in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion by the Court, in permitting bills of this kind to be paid out of unclaimed proceeds instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition. In the case referred to, the Court acted with the greatest caution and forbearance, and actually refused a second claim, as being too complicated in its circumstances. The authority of that case, therefore, does not extend to the present, but is rather adverse to it." The application was therefore refused.

The cases cited in the *John* in addition to that of the *Adventure*, to show that material-men had a kind of lien, and might be paid out of the proceeds remaining in the registry of the Court, appear to have been as follow *: —

1761. Wharton, *Whishaw*. Henry Bird and Co., as *furnishers and fitters out* of the ship, obtained a decree for 183*l.* 8*s.* 7*d.*, and also Jonathan Eade and another, as *furnishers and fitters out*, for 68*l.* 12*s.* 5*d.* The ship had been sold upon an arrest for wages by the surgeon.

*** In this case the balance of proceeds remaining in the registry, after satisfying the above claims, and the claims of the seamen, was paid out to the proctor of the assignees of the owners of the ship; there seems to have been no opposition.

1761. Barbara, *Prodham*. Jonathan Eade and others,

* Copied from a valuable note by Dr. Haggard to the 3rd volume of his Admiralty Reports.

furnishers and fitters out, obtained a decree for 82*l.* 4*s.*; this was the whole balance in the registry. There was no appearance for the owner.

1817. *Harmonia.* In the *Harmonia,* upon an application for payment out of proceeds by a provision merchant and a brewer, notice of opposition by the assignees was given, but not persisted in, and the claims of the material-men being satisfied, the remaining proceeds were paid to the assignees.

1832. Bombay, *Dare.* In this case Sir Christopher Robinson allowed out of proceeds 150*l.* advanced by Dodd and Co., ship-brokers, to the master, in order to pay the chief mate. Also, a tradesman, who had supplied carpets for the outfit of the ship to the East Indies with passengers, was paid out of the proceeds. The remainder of the proceeds was reserved by the owners.

1832. Unity, *Danley.* A ship-agent allowed, by the same judge, repayment out of proceeds of a sum advanced to the captain, and paid as wages. There was no appearance for the owners.

The *Neptune* * is the next, and the last case upon this point; but it becomes necessary first to mention, that the judgment in that case was reversed on appeal to the privy council, and as a long line of precedents has been given in favour of the practice, it will, it is presumed, be best seen how they are qualified and contradicted by the following abridgment of that case, both in the Admiralty and Appellate Court.

The *Neptune,* a vessel of considerable value, was arrested under warrants from the Admiralty Court, in different actions for seamen's wages, and no bail being given, she was, after the usual steps, sold by decree of the Court. The proceeds were brought into the registry,

* 3 Haggard's Admiralty Reports, 129.

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and the several claims for wages having been satisfied, a very large balance remained therein. The owner of the vessel had become a bankrupt, and some material-men arrested such proceeds, claiming a lien upon them, and to be entitled out of such proceeds to the payment of their bills in preference to other creditors. The assignees of the owner had not appeared to resist those claims, but a mortgagee styling himself mortgagee in possession, appeared and opposed the payment to such material-men from the proceeds. The question to be decided was, therefore, one of priority of lien between the owner or his representative and material-men against *proceeds* in the possession of the Court of Admiralty, and not against the *ship* itself. "The Court of Admiralty, is governed by the civil law, the law marine, and law merchant, unless where those laws are controlled by the statute law of the realm, or by the authority of the municipal courts, which unquestionably possess a superintending power, and might restrain this Court should it overstep the just limits of its jurisdiction. If, then, in any matter, the municipal courts have prohibited the Court of Admiralty, it is bound to acquiesce not only in that individual case, but in all others where the same point arises, and thenceforward the civil and maritime law so controlled, becomes the law governing the decisions of this Court." The Court then quoted the cases and authorites given at p. 96. of this work, that by the maritime law, as corrected by the law of England, material-men cannot arrest an English ship *in specie* for costs of materials supplied in England, and that material-men without possession had no lien; but the owner in this case had not possession of the ship, nor of the money paid as proceeds into the registry of the Court; he voluntarily lost the possession by due course of law, by neglecting to give bail to the action for wages. Had he given bail, he would have been re-

instated in the possession; whereas, by his own omission, and under the sale decreed by the Court, he had suffered the proceeds to pass into a different possession, namely, into the possession and custody of a Court governed by the civil and marine law, except in as far as it is controlled and restrained by the municipal law; and that although the Court of Admiralty has been prohibited in suits at the instance of material-men against the *ship*, yet the ancient law has never been controlled, nor has the Admiralty ever been prohibited with respect to such suits against the proceeds. Those are in the possession of a court which, proceeding according to the civil law, holds them in *usum jus habentium*. Different considerations too apply to the arrest of ships and the appropriation of proceeds.*

"Another equitable claim in material-men to preference, arises from this consideration. It may often happen, and sometimes to a great extent, that a very large proportion of the proceeds is produced by the very materials for which the tradesmen seek repayment. The ship may just have been repaired, very valuable materials may have been expended; the ship is sold through the default of the owner of the vessel, or in consequence of his bankruptcy, and the proceeds arising principally from the recent expenditure are remaining in the registry: surely those who furnished the materials which created this increased value, have an equitable title to preference as against the owner, as against other creditors, or as against the mortgagee of the ship, for he can be in no better situation than the owner himself."

The practice of paying material-men out of the proceeds has been traced to exist since 1761†, although it was contended that payment out of proceeds has never

* Viz., as mentioned above, p. 98.

† See the cases above, p. 102.

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been made to material-men when the owner has appeared and objected; the Court held that that might be so, because in such cases, the owner, having appeared, may have shown that claim was fraudulent or not well-founded, and that the bare appearance and opposition of the owner, could not be a sufficient ground for refusing to allow the claims of material-men to be paid out of the proceeds. "If the owner has not usually appeared, the only legitimate inference is, that the law in favour of the claim of the material-men has been considered to be settled, and that their claim was just; otherwise, no doubt, prohibitions would have been applied for or appeals interposed." The Court, in pronouncing for the claim of the material-men, concluded the decision in this case with the following forcible words: "This long practice founded on principle, on the law civil and maritime, on the usage of other nations, and on the ancient practice of this Court, unchecked by prohibitions except in the case of proceedings against the ship itself — this practice so founded and so allowed to grow up, I shall not disturb."

An appeal was instituted by the mortgagee in possession to the Privy Council, and the judicial committee were of unanimous opinion that the decree appealed from ought to be reversed, and that the appellant, as mortgagee in actual possession at the time of the seizure, was entitled to have the balance of the proceeds paid out to him. The following is a part of that judgment: —

"It seems to have been assumed in the argument of this case, that prior to the reign of Charles II., the law of England, as administered in our Admiralty Court, with respect to the rights of material-men, corresponded with the civil and maritime law, as adopted and acted upon by other nations in Europe, and that it was in the reign of Charles II., that the en-

forcements of those rights had, from motives of commercial policy, been first limited and restrained by the interference of the municipal courts in prohibiting all proceedings against the ship itself. And the whole fallacy of the respondent's argument lies in this assumption; for it must be conceded to them, that if, by the maritime law of England, persons furnishing supplies to ships in this country, had, prior to the reign of Charles II., a lien on the ship for the amount of those supplies, not only would their right to arrest the proceeds of the sale remain unaffected by the prohibitions issued by the municipal courts, in suits against the ship itself, but such prohibitions would themselves have been indefeasible upon any known principle of law, for no authority but that of the legislature could alter the law, or destroy the existing rights of the material-men by taking away their remedy. But the common law courts assumed no such power; they did not affect to alter the law, or control the exercise of acknowledged rights, but they declared that the maritime courts had erroneously applied the doctrine of foreign maritime law to contracts made in this country, and denying that material-men ever had by the English maritime law in respect of such contracts, any lien upon the ship, or any preference over other simple contract creditors, they prohibited those proceedings which could only be justified by the existence of such a lien. It is unnecessary to enter into any detail of the cases upon this subject, the substance and the result of which are concisely, and in the opinion of their lordships, correctly stated by Lord Tenterden in his admirable work on Shipping, and from which he deduces this summary:—'That a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other

necessaries for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself, for the recovery of their demands;' and the reason of this, as the learned author states in an earlier passage is, because the law of England never had adopted the rule of the civil law with regard to necessaries furnished in England. If, then, material-men never had any lien on the ship itself, in respect of supplies furnished in England, how could they ever acquire a lien upon the proceeds of the sale of the ship?"

The case of *Buxton* v. *Snee* * was here cited, and the following remark of Lord Hardwicke in that case: "If, therefore, the body of the ship is not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other?"

As to the point pressed in argument, that inasmuch as the Court of Chancery only proceeds *in personam* and the Court of Admiralty *in rem*, the decisions in the former court do not necessarily conclude a similar question in the latter, it was the opinion of their lordships that this is not a question of jurisdiction, but of right. As to the series of decisions in the Court of Admiralty, they were considered to have been either unopposed cases, or to have been, by consent of the parties, under the advice of counsel.

A case which is very illustrative of the jurisdiction of the Admiralty Court, will find a better place here than in any other part of this treatise.† One John Whitfield, whilst sole owner of a brig called the *Flora*, as a security for a debt executed a warrant of attorney to confess judgment for 1000*l.* in the Court of King's Bench; a writ of *fieri facias*, addressed to the sheriff of

* 1 Vez. sen. 154.

† *Flora*, 1 Haggard's Admiralty Reports, 298.

the county of Kent, issued at the suit of the judgment creditor, and accordingly the brig, then lying in the *Thames* at *Deptford*, was arrested, but she was delivered up to a purchaser under a decree of sale from the Admiralty Court. The judgment creditor petitioned the Court of Admiralty to decree the balance of the proceeds of such sale to be paid out to him. The late owner (Whitfield) protested against this decree. A rule *nisi* for the marshal of the Admiralty to pay over the proceeds of the brig *Flora*, taken in execution by the sheriff of the county of Kent, was obtained from the King's Bench by Roberts (the judgment creditor), but was discharged on Whitfield showing cause *; the Court of Admiralty then decreed the proceeds to be paid over to *Whitfield*.

The Court of A. is bound to notice a judgment debt on the record of a superior court.

An appeal from this decree was prosecuted to the delegates, and the learned judges decreed a monition for the transmission of the balance of the proceeds, in order that they might be paid out to the late high sheriff for the county of Kent. This case is noticed at this length, and occupies this position, by reason that from the report of it, it appears clear that although the Court of Admiralty cannot enter into the contracts of general creditors, yet it may be bound to notice a judgment on record; so that if the Court has no jurisdiction to deliver over the proceeds remaining in the registry to material-men or other debtors, whether simple or by contract, it can clearly do so where the applicant relies upon a judgment debt on the record of a superior court.

* It appears that the application to the Court of King's Bench failed, because it was thought that that Court had no jurisdiction to proceed in such a summary manner against the officer of the Admiralty.

SECTION III.

The right of material-men, or of persons furnishing necessaries to ships to sue in the Admiralty Court, has at present been considered only so far as it relates to British ships; for, as will be presently seen, a very material distinction has been made with respect to foreign ships, with reference to the right of material-men to proceed against such ships in the Admiralty Court; but with regard to British ships in that respect, the law has not by that statute been altered, and the authorities which have been given above, are not thereby affected; it must also be borne in mind, that what follows relates only to foreign ships.

In cases of *foreign* ships, the Court of A. has jurisdiction to decide all claims for necessaries supplied.

By the 6th section of the 3rd and 4th of Vict. c. 65., it is enacted, that the High Court of Admiralty of England shall have jurisdiction to decide all claims and demands for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas, at the time when the necessaries were furnished in respect of which such claim is made.

With respect to foreign ships, therefore, the ancient jurisdiction of the High Court of Admiralty, mentioned above at p. 93., has been revived by this enactment; and as has been observed by the present learned Judge of the Admiralty Court, "it never was, nor could be, intended to alter the law, but merely to give a new remedy, which was rendered necessary in the peculiar cases of foreign ships, and which is confined to that necessity." The inconveniences, and in many cases the injustice, which took place in cases of necessaries being furnished to the use and to the credit of a ship, there being no owner in this country who could be

made liable at common law, and the benefit conferred on the merchants of England by this extension or renewal of the jurisdiction of the Admiralty Court, are so obvious as to require no further comment. It was decided in the *Alexander*†, that the jurisdiction conferred by the act applies to cases where necessaries have been furnished prior to the passing of the act: but the Court would feel itself bound to exercise that jurisdiction equitably; and, in so doing, it would protect the interests of all persons having a *bonâ fide* lien upon the property — as for instance, subsequent purchasers without notice. The learned Judge continued by remarking, with reference to that particular case, — "that no subsequent lien has been established as outstanding upon this vessel; and I wish to draw especial attention to this fact, that it may not be hereafter supposed, that in pronouncing for my jurisdiction, or exercising it upon the present occasion, I have held that a claim of this description, contracted by a ship four or five years antecedent to the passing of the statute, militated against subsequently acquired interests. I give no opinion upon this point; it may be a question hereafter which I have not now to determine, whether a ship having *bonâ fide* passed into other hands, would be liable to any such demand at all. * * * * * If, in any particular case, an injustice might be committed by the exercise of the new jurisdiction, it would be the undoubted duty of the Court to consider whether the new jurisdiction should be applied to such particular case; for instance, whether or not, in a case of this description, such circumstance might not operate to prevent a creditor from recovering against the ship. * * * * * In the present case, in which, by the general maritime law of Europe, the ship would be liable for the necessaries

† 1 W. Robinson's Admiralty Reports, 288.

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supplied, no intermediate rights, as far as it appears, are in conflict. The ship belongs to the same foreign owners who were in possession at the time when the debt was contracted, and there exists the same reason for the remedy as induced the passing of the statute in question, namely, the difficulty of suing such foreign owners who are resident abroad. * * * * * If, in the exercise of this jurisdiction, facts should be disclosed to the Court, showing that other persons have equitable claims upon this vessel, and that such claims will be prejudiced by the demand which is now set up by the material-men in this case, I must administer the law in equity and decide between them."

The jurisdiction given by the act is for *necessaries* supplied to any foreign ship; and it is important to observe the true meaning of the term used, — "if an erroneous meaning be put upon the word 'necessaries' great confusion will ensue." The only cases in which the legal acceptation of the term 'necessaries' has been discussed and decided in the Admiralty Court, are the following. The first was the *Alexander.*† In that case a proceeding was instituted against a foreign ship for a sum of money alleged to be due for the supply of an anchor and cable furnished to the vessel. It was not denied that the anchor and cable were ordered by the master, and put on board the vessel proceeded against; the defence set up by the owner against the claim of the material-men, was, in the first place, that the articles in question were supplied *for the private adventure of the master himself, and not upon the credit of the owners*‡; and secondly, that, under the circum-

† 1 W. Robinson's Admiralty Reports, 346.

‡ In the passage printed in italics in the Reports, an error has been committed by the printer, and which is mentioned only as in this solitary instance the usual accuracy and vigilance of the learned reporter in revision has been defeated, it not having been

stances of the case, they were altogether unnecessary, the ship being furnished with two anchors (her proper number); it was held that the legal definition of the term "necessaries" is, whatever is fit and proper for the service in which a vessel is engaged, and what the owner of that vessel, as a prudent man, would have ordered, if present. *Per Cur.* "In one sense an anchor and cable is a necessary, for a ship cannot sail in safety without them; but it does not therefore follow that at all times, or at any particular time, a new anchor and cable, or several, are necessary for the use of a ship: it is not sufficient to say that they are necessaries, but they must be necessary at the time, and under existing circumstances in the sense that the law requires." In this decision the Court of Admiralty is supported by numerous cases at common law.* The burthen of proving the necessity is thrown upon the person who supplies the necessaries.

Money may be included under the term "necessaries"

Under the term "necessaries" the advance of money may also be included, so as to bring the case within the provisions of the statute; but the Court must be satisfied that the necessaries were wanting, and that the money was *bonâ fide* advanced for the purpose of procuring them.† With respect to money advanced, then, the Court will require satisfactory evidence that it was so advanced for the necessary purposes of the

noticed among the *errata* at the end of the volume; it is there printed—"*not* for the private adventure of the master himself and upon the credit of the owner." In the "Notes of Cases" the Court is reported to have said,—"did not give credit to the owner, but to the master exclusively."

* *Webster* v. *Seekamp*, 4 B. & Ald. 352. *Cary* v. *White*. 1 Bro. Par. Ca. 284. A. D. 710. and given fully in Abbott on Shipping, 7th edition (Shee's), 136. *Robinson* v. *Lyall*, 7 Price, 592. *Rocher* v. *Busher*, 1 Starkie, 27. *Palmer* v. *Gooch*. The only case in which a contrary doctrine has been held, is a Scotch case, *Craigie* v. *Ogilvy*.

† *Sophie*, 1 W. Robinson's Admiralty Reports, 368.

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ship, for that constitutes a claim in the nature of a debt, and although the owner may be liable at law, it never could have been the intention of the legislature in passing the statute to give to the Court of Admiralty a jurisdiction to make the ship responsible for a common debt.

The Court of Admiralty has no jurisdiction in cases of necessaries supplied to a foreign ship in a foreign port.

And where necessaries have been supplied to a foreign ship building in a foreign port, the value cannot be recovered under the new act by arresting the vessel on her touching at an English port, it having been judicially determined that the Court of Admiralty has no jurisdiction to enforce such a claim; the intent and meaning of the act being, as was conceived by the present learned Judge of the Admiralty Court, to provide a remedy for a great inconvenience which had frequently occurred in this country, namely, where a foreign vessel had been driven by distress upon the coasts of this country and the master had no credit, there was a very great difficulty in obtaining a supply of those things which were requisite and necessary for the purpose of refitting the vessel and enabling her to prosecute her voyage. But as it would inevitably happen that, in some cases, the vessel might be in port within the body of a county, and in other cases anchored in what would properly be called the high sea, these words were expressly inserted to extend the jurisdiction of the Court of Admiralty, so as to include a vessel which had thus come to this country, and for the purpose of enabling her to return to her own country. The act expressly provides that the Court of Admiralty was to have jurisdiction with respect to any supplies which, in such cases, might be furnished to her; but it never was intended that such Court should exercise a jurisdiction in case any articles should be necessary for the fitting out, &c., of a vessel, and are furnished to that vessel, being then in any part

of the world, or building in any port of any foreign country, so that unless some legal obstacle intervene, such Court may enforce a perpetual *lien* on the part of a British merchant or manufacturer who may have supplied such articles, so that he may arrest that vessel and obtain payment, if ever she comes within the jurisdiction of the Court of Admiralty.

Another objection, illustrating the inconvenience and mischief of such an interpretation of that statute, was given by the learned Judge to the following effect. "The general law of the maritime states of Europe gives a *lien* to persons who furnish necessaries to a vessel in port, or on the neighbouring high seas, and which lasts till there be a superior title; but never for necessaries sent from one foreign country to another foreign country. If such a construction were put upon the act, the first consideration for the Court to discuss and determine as a matter of fact would be, whether the articles were furnished to one particular ship or not; afterwards, it would be necessary to enter into an investigation as to whether new rights had not been acquired in the ship, in the nature of salvage services, or bottomry, or by a transfer from one person to another. Thus the Court of Admiralty would be occupied in doing that which must always be a matter of the greatest difficulty, namely, ascertaining whether a transfer made abroad between foreigners under a foreign law, is a *bonâ fide* and legal transfer or not." But independent of the inconvenience of that construction, the opinion of the learned judge was very firmly expressed, that to bring the action within the requisites of the section, the necessaries must have been furnished to the vessel either within the body of a county or upon the high seas, in cases of exigency and of necessity arising.*

* The *Ocean*, 4 No. Ca. 31.

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The words used in the act are—"necessaries supplied to any foreign ship *or* sea-going vessel." It was suggested by counsel for a material-man in a case in which a motion was made to arrest a *Nova Scotia* vessel, under the authority given by that section, that even if she could not be considered a foreign ship, that the expressions "foreign ship" or "sea-going vessel" must be susceptible of some peculiar and proper signification, otherwise the latter words, "sea-going vessel," would be a mere surplusage and absurdity, because every foreign ship which may arrive in a port of this country, must, *ex necessitate*, be a sea-going vessel: and this suggestion was further relied on as corroborated by the two terms being expressly disconnected by the use of the disjunctive particle "or," and that, therefore, it must have been the intention of the legislature to give to each a distinct and separate meaning; but *held* by the learned Judge, that so extensive a power was never intended to be conferred on the Admiralty Court; that the effect of such construction would be, that every vessel fitted out in the port of London, would be liable to be arrested under the process of the Admiralty Court, for the purpose of enforcing against it any demand on account of necessaries supplied; and as this ship could not be considered a foreign vessel the motion was rejected.*

* The *Ocean Queen*, 1 W. Robinson's Admiralty Reports, 457.

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ON THE JURISDICTION OF THE ADMIRALTY COURT IN CAUSES OF WAGES.

SECTION I.

THE locality in which the agreement for the payment of the wages of mariners is entered upon, is neither the test by which the jurisdiction of the Admiralty Court can be determined, nor would such appear to have been ever the limit of the Admiralty jurisdiction in that respect. If the rule of locality could at all apply, it must have been with reference only to where or how the wages were earned; but that the seaman, unacquainted and blind as he must be, both as to the credit or solvency of his employer, and as to the management or probable success of the ship in the particular voyage for which he engages himself, should have a prompt, efficacious, and secure remedy for the satisfaction of his claims for labour and toil,— in some cases extending over a long period, and in all attended with the greatest risk and danger,—would appear to be the generous reason for which the Court of Admiralty was originally allowed by the superior courts to enforce such claims, without reference to the place where the agreement was made. The indulgence of a lien in favour of the mariner is not only a benefit to him,—by that means navigation is encouraged. Good and efficient mariners eagerly lend their employment where, otherwise, a ship might "rot by the wall;" their caution is lulled; their services are entered upon and rendered with a knowledge of their security; their efforts to

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navigate and well conduct their ship, are encouraged by their knowledge, that if in an arduous and perilous voyage, they stand by and bring their ship into port, they bring their wages with it, and that the dangers of the ocean are those alone which they have to brave. "He has a right to cling to the last plank in satisfaction of his wages *;" to leave to them only the mere formal proceeding of an action at law for the recovery of their wages, would be to deprive the ships of seamen, and the sea of ships.

Mariner may sue in the Admiralty where ship is lost, if freight be earned.

But the right of mariners to sue for their wages in the Court of Admiralty is not extinguished by the loss of the ship. "Freight is the mother and the only mother of wages;" if that goes, everything goes: and whenever freight is earned, the title of the mariner to wages becomes vested. "The mariner is not permitted to insure his wages by the policy of our law, in order that he may be stimulated to all possible personal exertion for the preservation of the ship, on which alone all his own interests are made to depend. The result is, that the mariner embarks (with reference to the owner) upon terms of great comparative disadvantage. The owner contracts with a certainty of receiving his freight at all hazards, if not from the hand of his freighter, from that of his insurer, and it is indifferent to him from which: if he does not insure, it is only because he thinks it more beneficial to himself to stand his own insurer. But the mariner goes to sea upon the single security of the freight." †

The freight, therefore, being the security of the mariner, and it being the policy of courts to uphold his lien upon it, and the Admiralty Court having jurisdiction upon

* *Per* Lord Stowell, 2 Dodson's Admiralty Reports. *Neptune*, 1 Haggard's Admiralty Reports, 239.

† *Per* Lord Stowell. The *Juliana*, 2 Dodson's Admiralty Reports, 509.

the freight, the mariner can sue in the Admiralty Court though the ship be lost, if freight be earned. By the general law of England, title to wages accrues upon the receipt of freight, not by the special terms of the contract, but by the general policy of the law; and attempts to extinguish the right of the mariner by collateral bonds of renunciation of the payment of wages, in case the ship should be lost, have failed.

Covenant in ship's articles that mariners should not be entitled to wages if ship be lost, no bar to suit in Admiralty.

In the *Juliana*, a suit was instituted in the Admiralty Court by a seaman, against the owners of the ship, for the recovery of wages earned in a divided voyage, in which cargoes were successively taken in and delivered at different ports, and freight thereby earned for the owners; but was opposed by the owners, on the ground that a covenant was inserted in the ship's articles, that they should not be entitled to any part of their wages unless the ship should return to the last port of discharge: and by reason that the ship was lost on the last part of such divided voyage. — *Held* by the Court that the mariners are, by the general law, entitled to their wages up to the time of arrival at each port of delivery; and such attempt to extinguish the general law, was, therefore, not upheld.

Mariner cannot sue cargo in the Admiralty *qua* cargo.

But a mariner has no lien on the cargo as cargo; his lien is upon the ship and on the freight as appurtenant to the ship; and so far only as the cargo is subject to freight, he may attach it as a security for the freight that may be due; and, therefore, in a case in the Admiralty Court, in which a person was owner of both ship and cargo, and both were insured by him, and were lost at sea, it was held that as it was not a divided voyage, and as no freight was made or to be received, the mariner could not proceed against the owner of the ship and "cargo lately laden on board." The owner having effected an insurance on the cargo could give the seaman no right to wages in the Admiralty. "The

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policy of the law requires that a seaman should not insure his wages; he must take the risk of the ship and stand by her at every hazard; he has a lien on the ship to the last plank, and on the freight which is appurtenant to the ship; an insurance does not benefit the seaman, for if a seaman could look to the insurance of the ship as a security for his wages, it would be a substitution for his own private insurance, and would defeat the policy of the law; a seaman generally knows whether the ship be insured or not, and if such an insurance could inure to his advantage, it might make him indifferent, and moderate, if not extinguish, all exertion on his part; an insurance effected on the cargo cannot be taken as the freight itself earned and made."

The lien of the mariner then being on the ship and freight, and clearly not upon the cargo *as* cargo, the question remains, whether if any cargo had been saved, it could be held to represent the freight, where ship and cargo belong to the same owner; this is yet an undecided question.*

If, when ship and cargo belong to same owner, and ship be lost and cargo saved, mariner can sue in the Admiralty against cargo. *Quære.*

This same point, viz., as to whether, if the ship be lost, the cargo can so far represent it and the freight as to give to seamen the right of suing for wages in Admiralty against it, was raised, but not decided, in a very recent case in the Admiralty Court †, wherein the vessel itself was lost, but some of the cargo was saved. *Per Cur.* "I am not aware (and I believe the point never has been decided in this Court,) of any case whatever in which it has been decided, that where a part of the cargo has been saved, and the ship has been wholly lost, the mariner can prosecute a suit for wages in this Court against the cargo itself. The question was, I find, indirectly noticed in the case of the *Lady Durham* (that being the case noticed above). Against

* *Lady Durham*, 3 Haggard's Admiralty Reports, 196.

† *Riby Grove*, 2 W. Robinson's Admiralty Reports, 52.

the cargo *quâ cargo*, the seaman can have no claim; at the same time, I think, that as against the cargo, where freight has been earned although not paid, the case might perhaps be subject to a different consideration. I do not, however, feel myself called upon to express any immediate opinion upon this point in the present instance, and I should be extremely reluctant to conclude myself upon a point which may possibly occur hereafter, namely, when the owner of the ship is the owner of the cargo, and the ship is lost but the cargo is saved.

"Technically speaking, in such a case, no freight would be payable, because there can be no freight payable from a man to himself: yet, the cargo would include in itself the value of the freight; upon this point, however, I again repeat I do not wish to be considered as pronouncing any decision in the present instance."

So, if there be no freight, but the ship or any part thereof is saved, mariner can proceed *in rem*.

And a mariner may be entitled to wages, even if no freight be earned; as where a vessel is sent out upon a seeking voyage in search of freight and obtains none; for, if the ship arrives home in safety, the man, by his contract, has a lien upon her; he may proceed *in rem*, and, therefore, though freight be the mother of wages, and where freight is made, wages are due, yet it does not follow in all cases, that if there be no freight there can be no wages. By the *Neptune* *, also, it is clear that where part of a vessel had been saved by the exertions of the mariners, they are entitled to payment of their wages as far as the fragments of the materials would form a fund, though no freight has been earned by the owners; so that although it is a maxim of maritime law that freight is the mother of wages, it by no means follows *e converso*, that where no freight is due,

* Clark, 1 Haggard's Admiralty Reports, 227.

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no wages also are due; and so where a ship and cargo have both been condemned for illegal trading during the voyage, and the voyage on that account interrupted and no freight earned, if to this fraud the mariners are not parties, such condemnation neither works a forfeiture of wages, nor does it even bar the mariners from suing the owners for them by action in the Admiralty Court.*

"The maxim (that freight is the mother of wages) though generally received, like most other maxims delivered in figurative terms, certainly is not formed with real and strict accuracy; for the natural and legal parents of wages are the mariner's contract and the performance of the service covenanted therein; they, in fact, generate the title to wages. The rule that makes the payment of wages dependent on the earning of freight is an additional security to the safety of ship and cargo, and, as the Lord Chief Justice *Abbott* expresses it in his excellent publication, was framed in order to stimulate the zeal and attention of this class of persons engaged in very perilous service. The payment of wages is made by the policy of maritime states to depend on the successful termination of the voyage, entitling the owner to his freight, though in other commercial contracts the workmen are entitled to their stipulated wages, though a losing concern does not supply a fund to the merchant adventurer himself for the payment."† There are many reasons why the mariner should not be paid by way of salvage, or *quantum meruit*, in cases of misfortune to the vessel‡, and many reasons why the rule of wages, as before given, is most beneficial to the owners and encouraging to navigation.

* The *Malta*, Young. 2 Haggard's Admiralty Reports, 158.

† *Per curiam*, *Neptune*.

‡ But see s. 17. of 7 & 8 Vict. c. 112.

In the recent act relating to merchant seamen*, it is enacted that, in all cases of wreck or loss of the ship, every surviving seaman shall be entitled to his wages up to the period of the wreck or loss of the ship (whether such ship shall or shall not have previously earned freight), provided that the seaman shall produce a certificate from the master or chief surviving officer of the ship to the effect that he had exerted himself to the utmost to save the ship, cargo, and stores.

Although the jurisdiction of the Admiralty Court was, doubtless, originally constituted for the adjudication of causes and disputes *arising* upon or beyond the high seas, and though, by the earlier statutes relating to the jurisdiction of such Court, it was enacted that the Admiralty Court should not meddle with things done upon the sea, and that all manner of contracts, pleas, and quarrels, and all other things arising within the bodies of counties, as well by land as by water, the Admiral's Court shall have no manner of cognisance, power, nor jurisdiction; still, the exception in favour of the mariner's contract appears always to have been maintained, and if the enactments above mentioned were considered, such exception may have been upheld by reason of the place in which the service was performed, viz., on the high seas, for the agreement for such service is, of course, usually made on shore or in a port or river. But is it not more probable that the conveniences above alluded to are the grounds upon which such exception was made? for, otherwise, the master of a ship, whose place of agreement and whose nature and place of service are usually the same, would be entitled to the same privilege, and, as will be more fully mentioned, a distinction has always been made between him and the mariners in such respect. Lord Tenterden

* 7 & 8 Vict. c. 112. s. 17.

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in his book on Shipping, referring to several cases, says: "The suit of the seamen in the Court of Admiralty is frequently spoken of as an excepted case, and an indulgence granted to them on account of the convenience and advantage of proceeding in a court in which all may join in one suit, and payment may be obtained out of the value of the ship, and of the presumption that they who contract with the master, contract with him on the credit of the ship; whereas the master who contracts with the owners, is presumed to trust to their personal credit."* "We know the language which has been occasionally held in the courts of common law with respect to the jurisdiction which this Court exercises in cases of mariners' wages. Suits for wages due to mariners of our own country, have been said to be entertained by the Court of Admiralty, more from a kind of toleration founded upon the general convenience of the practice, than by any direct jurisdiction properly belonging to it; although the exercise of such a jurisdiction has existed from the first establishment of such a court.

Ship-master cannot sue for wages in Admiralty. Mate can.

The master, then, not standing upon the security of the ship, has been prevented from suing in the Admiralty Court; but it is not so with the mate; he is not such a *master mariner* as to be prevented from suing in such court as mate; and, as it is an accident of frequent occurrence that such a seaman is, in the course of the voyage, called from his position as mate to perform the duties of and to become the master of the vessel, it is necessary that we should consider how far the Court

* *Rogg* v. *King*, 2 Stra. 858. 1 Bern. 297., and *King* v. *Player*, there cited. *Clay* v. *Sudgrave*, or *Snellgrave*, Salk. 33. 1 Lord Raym. 576. 2 Mod. 405. Carth. 518. *Read* v. *Chapman*, 2 Stra. 937. The *Favourite*, De Jersey, 2 Robinson's Admiralty Reports, 232.

of Admiralty has jurisdiction to enforce his claim against the ship for his services during the voyage.

Mate afterwards becoming master, can as mate.

In *Read* v. *Chapman**, a man went out as mate, and on the death of the master succeeded to the command and brought home the ship, and sued in the Admiralty Court for his wages as *mate*, and for a further allowance after he became master; a prohibition was granted *quoad* the time he was master, and refused *quoad* the time he was mate.

Lord Stowell, in the *Favourite*†, remarked to the effect that had it not been for the preceding case, he would have felt disposed to entertain a suit by a person who had set out as mate, but who, during the voyage, had become master, for payment of his wages in both capacities, because, he having contracted originally as mate, and becoming master in consequence of subsequent events, it is still such a demand as might be taken to arise out of his original contract. "This original contract being not only that he shall perform the duties of mate, but also by necessary implication of law, that he shall, in case of necessity, take upon himself also the duties of master; for, by the maritime law, the mate is *hæres necessarius* to the employment of master in case of necessity; it might, therefore, have been understood as a thing mutually understood in the original contract, and foreseen and provided for at the time and in the act of forming it: the Court might have been induced to sustain such a suit, not under the view of a contract entered into by this man as master, but as a consequence arising originally out of the primary contract as mate, over which contract this Court has an undoubted jurisdiction." But as it appeared that the common law courts had determined otherwise and granted prohibitions on the point, he was held entitled only to proceed

* 2 Strange, 937.

† 2 Robinson's Admiralty Reports, 237.

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for his wages as mate, and excluding the *quantum meruit* due to him as master, and for the additional duties performed by him as master he had to apply elsewhere. The Court being asked, whether his demand as mate must end with the day of his appointment as master, was further of opinion that he was entitled to his wages as mate during the whole time, but that for a reward of his additional services he must go elsewhere. "I consider his new character of master as superinduced to that original one of mate: he contracted to serve as mate, and it is a part of that contract, legally implied in it, that he shall likewise act as master, in case of the death or removal of the actual master; but I do not think that the character of mate is necessarily merged in that of master; or that his title to a mate's wages is totally extinguished by his acquired title to a *quantum meruit* for his additional service as master; unless it can be shown that the office of mate was regularly devolved upon somebody else, and the duties of it were entirely performed by that other person." In cases of material-men*, it has been mentioned, that although they could not sue against the ship, they were originally allowed to assert their claims against proceeds remaining in the registry; it appears that this distinction, namely, between an original suit and a permission to be paid out of proceeds has, as regards the claims of a master, never been entertained. In the *Favourite* an inquiry was made, but no case was found in which a master has been permitted to sue against proceeds in the registry, except in cases of mere remnants and surplus; and not even then if there were any adverse interests opposing it.

So, in that case, he can sue for wages *as mate* during the whole voyage.

Neither can master sue against proceeds remaining in the registry.

Chief mate can.

In the *Lord Hobart* †, G. *the commander* hired J. B. as *master or chief mate;* it was held, that the circumstance

* See above, p. 101. et seq. † 2 Dodson's Admiralty Reports, 100.

of G. being described as *commander of vessel*, made it quite clear that J. B. was to be considered in the capacity of *mate*, and as such was entitled to sue in the Court of Admiralty for his wages, notwithstanding the appellation of *master or chief mate*.

Surgeon can, for his wages, but not for medicines furnished.

It appears also that a surgeon may sue in the Admiralty Court for his wages; for although in the same case it was doubted by Lord Stowell whether the Court possessed jurisdiction over such claim *, on the ground that no case had been brought to the notice of the Court in favour of the jurisdiction, there was no direct decision upon the point; and it is observed by the learned reporter to that case, that if the cause had been persevered in, it is not improbable that the Court would have permitted the surgeon to sue under the authority of the case of *Miles* v. *Long*.† In that case, the Court of King's Bench unanimously decided that a surgeon of a ship may sue in the Admiralty Court for his wages; one of the judges (*Foster*) at first doubted, but afterwards concurred in opinion with the rest of the justices.

But for medicines furnished by such a person for the use of a ship's crew, payment cannot be recovered in the Court of Admiralty.

Female.

It appears that a female mariner may earn wages and sue for them in the Admiralty Court; such a claim was pronounced for in the *Jane and Matilda* ‡, where seaman's work was proved to have been done, and well done, by a woman.

Boatswain.

The boatswain is a mariner and can proceed for his wages in the Admiralty Court.§

Carpenter.

On a motion for a prohibition to the Admiralty Court, it was held that a ship's carpenter may sue for wages there, and the prohibition was denied. ‖

* Same case. † Sayer, p. 136.
‡ 1 Haggard's Admiralty Reports, 187.
§ *King* v. *Ragg*, Stra. 858.
‖ *Wheeler* v. *Thompson*, Stra. 707.

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SECTION II.

Foreign seamen can sue in Admiralty with consent of ambassador, for wages earned on foreign ship.

We have at present considered only the claims for wages which have been brought by English mariners; it remains for us to consider how far the Court of Admiralty will or can entertain such claims when brought by foreigners against foreign vessels being in the ports of this kingdom.

Wages being due by the general maritime law, however modified by the particular regulations of different countries, the practice of the Court of Admiralty has been, at the suit of foreign seamen with the consent of the accredited agent of their own government, to entertain proceedings for wages against foreign vessels in which they have served, such vessels being in the ports of this country; but it appears that the claim, to authorise the jurisdiction of the Admiralty Court, must arise out of the general maritime law, and the Court cannot enforce the municipal regulation of a foreign country; for, in the case of the *Courtney**, an American vessel, from which, upon her arrival in this country, the men were discharged, but they libelled in the Admiralty Court for more wages being due in consequence of this discharge, and in support of such demand they pleaded an extract from an act of congress, which was printed at the back of the mariner's contract, to the effect that if they were discharged in a foreign country the mariners should be entitled to three months more pay. The Court entertained the suit for the wages due during, and in respect of, the voyage, by the consent of the representative of the United States, but refused to entertain the suit with respect to the three months' advance pay, considering that it had no juris-

But the claim for wages must be by the general law.

Cannot therefore enforce a municipal regulation of the foreign

* Edwards' Admiralty Reports, 239.

diction to enforce the municipal regulation of that country, although, if the regulation had been embodied in the contract, so as to compose a part of it, the Court might have been empowered, in that case, to carry it into full effect, as an article of the contract between the parties.

country, unless it be embodied in the contract

But where it is impossible that the consent of the accredited agents can be obtained, as for instance, where the ship is an enemy's ship, coming to the ports of this country, under a licence, the Court will entertain a suit for the foreign seamen.*

Where consent of ambassador cannot be obtained, Admiralty Court will proceed without it.

In the *Batavia*†, suit was brought by J. S. for wages as mate. An appearance under protest was given to the jurisdiction by reason, *first*, that the ship had been transferred to foreigners, and its name and national character changed: that the consent of the foreign ambassador, consul, or other public officer, had not been obtained; *secondly*, because the party promoting the suit was not a British but a Batavian mariner; *thirdly*, that he was not mate but master, and could not sue for wages in the Admiralty Court (it was not fully proved that the transfer of the ship was *bonâ fide*, nor that the mariner was other than of British domicil). *Held* by the Court, that if even the fact were fully established that this vessel had been transferred to a foreign owner, the Court of Admiralty had authority to take care of the claims of a *British* mariner. It can never be allowed that the owner shall, by selling his ship in a distant part of the world, divest the seaman of his wages, earned under a contract entered into with himself in this country; *à fortiori* would the Court entertain the suit if a mere colourable transfer? The pretence that this man had lost his right of suing for

British seaman can sue foreign ship without such consent.

* *Vrow Mina*, 1 Dodson's Admiralty Reports, 234. See also the *Frederick*, 266.

† 2 Dodson's Admiralty Reports, 500.

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his wages as mate, on the voyage from this country to *Batavia* and back, because he acted in the capacity of master in conducting the vessel from *Gravesend* to *London*, no valid objection.

Where foreign ship is abandoned by the owners, no such consent required.

But where a foreign ship arrives in a port of this country with foreign seamen, and is abandoned by the owners, and sold in this country or assigned to English creditors, the consent of the representative of the foreign state is not required, for wages then become due by the general maritime law, although the mariners may have made an agreement not to take proceedings in foreign ports, or until the ship shall return.*

Whether the consent of the foreign *consul* be a sufficient authority for the Court of Admiralty to entertain such a suit between foreign subjects, or whether the consent of the foreign minister or ambassador must be obtained, does not appear distinctly determined. An unreported case was cited in the argument in support of the protest in the *Wilhelm Frederick*, in which the Court said: "that the consent of the Spanish consul was not sufficient to authorise the Court of Admiralty to entertain a suit between Spanish subjects, but that the sanction of the Spanish minister was necessary."†

It is not the consent of the ambassador which confers the jurisdiction.

But what has been previously observed with respect to the suits of foreigners for their wages in the Admiralty, must not be detached from the doctrine laid down by the present learned Judge of the Admiralty in a recent

* See the *Wilhelm Frederick*, 1 Haggard's Admiralty Reports 138.

† See also the *Margaret*, 3 Haggard's Admiralty Reports, 238.; a wages suit. A warrant of arrest at the instance of foreign seamen, shipped at Ancona, by the master, who stipulated to procure them a passage back, with wages, was decreed against the freight and the master, the ship being gone, and the claims of the men admitted; and upon the return of the ship to England, held also (the claims being unsettled) that the ship was liable for the whole demand—wages and costs.

decision upon the subject.* It appears clear, from that case, that the consent of the representative of the foreign state is by no means requisite to found the jurisdiction of the Admiralty Court, although it is indispensable that notice of the intended proceedings should be given, in the first instance, to the representative of the foreign government, so that if any objection should be taken against the prosecution of the proceedings in the Court of Admiralty, it would be informed of the grounds upon which such objection was taken, and would be enabled to form its own judgment of the sufficiency of such objection, and adopt such a course as may be most conducive to the furtherance of justice in the cause: not that the Court would feel bound to act in accordance with the views that might be entertained by such representative.

The notion that the Court has no jurisdiction, save by consent of the ambassador, consul, or minister of the country to which the vessel belongs, must, therefore, be considered subject to the correction above alluded to; "for if the Court does not possess an inherent jurisdiction over the subject-matter, it is not possible that the consent of an individual could confer such jurisdiction." The Court must possess original jurisdiction over the subject-matter, or it can have none at all; for the consent of a foreign consul or minister never could confer a jurisdiction upon a British court of judicature.

"Now, upon general principle, I apprehend that this Court, administering, as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description. Can it then be consistent with the principles of justice, that the exercise of this right should depend entirely upon the consent

* *Golubchick*, 1 W. Robinson's Admiralty Reports, 145.

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of a foreign minister or consul, who should be authorised to prohibit the Court altogether, or to induce it from exercising its jurisdiction? How would the question stand in other courts? In other courts of this country I have no doubt that the mariners might have instituted an action *in personam* against the master, without reference to any consent at all. Why, then, should not proceedings be competent on their part in this Court against the ship? For, by the general maritime law, the ship is the primary security for their wages. Is it just or proper that the consent of the foreign representative should be necessary to put this Court in motion, and should not be necessary in a court of common law? How is it possible there can be any such difference between them?

"Upon general principle, then, I am inclined to hold that this Court does possess a competent jurisdiction to adjudicate in these cases: at the same time, the exercise of this jurisdiction is discretionary with the Court; and if the consent of the representative of the government to which the vessel belongs is withheld, upon reasonable grounds being shown, the Court might decline to exercise its authority. Indeed, circumstances might occur upon the face of the case itself, in which this difficulty might arise; that the matter in dispute was so connected with the municipal law of a foreign country, that this Court would be incompetent to render impartial justice: in such cases, undoubtedly, the Court would decline to adjudicate."

All the cases which have been cited or quoted from above, were then commented on by the learned Judge; a case was also referred to from the American Reports, being a decision pronounced by Mr. Justice Storie, to the effect that the Court has a jurisdiction in all cases of wages as questions of general maritime law; and upon that law the mariner's title to wages was founded, and

not upon the municipal law of this or that particular country, although, in some cases, circumstances may arise to induce the Court to decline the exercise of that jurisdiction.* It has also been judicially determined, that alien enemies are at liberty to sue in the courts of this country for wages earned by them as mariners on a voyage to this country under the protection of a licence†; for in such a case Lord Stowell pronounced for the jurisdiction of the Court, and compelled the payment of their wages to the seamen.

Post office packet may be arrested for wages.

A post office packet may be arrested in a suit for mariner's wages: in cases of that kind, it appears to have been the custom to give notice to the post office, but the reply having been always that no objection existed on the part of the officers of that establishment; in the case of the *Lord Hobart*‡, a suit of that nature was entertained without notice in that particular case.

SECTION III.

Admiralty no jurisdiction where the contract is special.

The jurisdiction of the Admiralty Court has been at present considered, with respect to the wages of the mariner, as due by the general maritime law, and where the agreement for the service of the mariner is of the usual kind; for, if the contract for service be made on conditions which differ from such general maritime law, the service alone cannot give the seaman a right

* The *Jerusalem*, Gallison's American Reports, p. 198.

† The *Maria Theresa*, 1 Dodson's Admiralty Reports, 303. Lord Stowell said in that case: "Suppose they (the mariners) do go back, how are they to obtain their wages? They can get no redress from an American court of justice; for the whole transaction is illegal by the laws of that country."

‡ 2 Dodson's Admiralty Reports, 100.

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to sue in the Admiralty Court; his right to wages will then depend upon the terms of the contract, and a *special* agreement being produced in the Admiralty Court, is a bar to the jurisdiction of the Court. The construction of an instrument, in which terms differing from the general rule of law are inserted, is a subject proper for the discussion of the courts of common law; and where, in a suit of wages in the Admiralty Court, it was attempted to be pleaded on the part of the mariner, that, on a whaling and sealing voyage, such mariner had hired himself as chief mate at and after the rate of a twenty-fourth part or share of the net produce of the oil and skins produced thereon, such matter was rejected, the Court holding it possessed no jurisdiction*; and, in a late case†, the present learned Judge of the Admiralty Court refused to admit the petition of a mariner in a suit for wages, which pleaded that an agreement was made by the master, that the said mariner should receive the sum of 50*l.* on the arrival of the ship in London, and that he should be furnished with his passage back. Two letters from the master were exhibited as a part of the proof of such agreement, by which it appeared that this mariner was engaged, not so much for the ordinary service of a mariner, as that by his example several other seamen would join the vessel. The action, therefore, was founded on this special agreement, and not on the ordinary mariner's contract, and the Court refused to maintain it, intimating that it would be subject to a prohibition if it did so.

Another case ‡ of special contract, in which the Admiralty Court withheld its jurisdiction, should be mentioned here. It was a suit brought by a mariner in the

* The *Sydney Cove*, 2 Dodson's Admiralty Reports, 12.

† The *Mona*, 1 W. Robinson's Admiralty Reports, 137.

‡ The *Riby Grove*, 2 W. Robinson's Admiralty Reports, 52.

Admiralty Court for wages earned on board a vessel, in a whaling voyage to the Greenland fishery, and which being there occupied in catching seals and whales for a considerable time with success, was eventually lost, but a certain portion of the stores and oil, &c. was saved. The agreement upon which the mariner relied for payment of his wages, was to the effect, that he should be paid wages at the rate of 2*l.* 15*s.* per month, and 1*s.* 9*d.* for every ton of oil which should be obtained in the said voyage. It was held that the Court of Admiralty had no jurisdiction to decide upon such a claim, being in the form of a special contract, and of the nature of a partnership transaction. *Per Cur.* "Supposing I was to pronounce for the wages as claimed, and to compel the owners to bring in the 800*l.* which it is alleged they have received, in what way am I to apportion the shares of the seamen? I must enter into a difficult investigation and decide upon hand-money in advance, and what is termed striking or fish-money, and the shares which the mariners are to take for oil-money per imperial ton.

"What must I do besides? Why, when the parties become partners under these circumstances, I should further have to decide between the interests of the mariners and the owners; for could I possibly determine that the persons on board this ship are to take all that has been saved, in total exclusion of the owners? Are they not partners in one and the same adventure?

"Would not the equitable course of proceeding be, that all the parties should come in to share, and receive a division of the property which has been saved, in proportion to the amount to which they may be respectively entitled? This Court is utterly incompetent to enter into any such appointment; I therefore feel bound to reject this summary petition, and I do so upon three grounds.

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"First, because the contract is a special contract, such as is described by Lord Tenterden as ousting the jurisdiction of this Court.

"Secondly, because I conceive that I am confirmed by the authority of Lord Stowell in so doing.

"And lastly, because the contract being in the nature of a partnership, I should have, in entertaining the question, to encounter such difficulties as would render it impossible for the Court to arrive at a just and equitable result."

In *Opy* v. *Addison**, a prohibition was granted to the Court of Admiralty on a suit there for mariner's wages, on suggestion of a contract made for them at land; and the Court held that, for convenience of seamen, the Admiralty had been allowed to hold plea for mariner's wages; but yet with this limitation, that if there be any special agreement by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such case a prohibition shall be granted. A special agreement, therefore, supersedes the Admiralty law, and the Admiralty jurisdiction†: such law and jurisdiction only comprising such cases of mariner's contracts when in the ordinary and usual way, where it is a mere memorandum fixing the rate and ascertaining the wages.‡ The fact of such memorandum or usual agreement being in writing cannot defeat the jurisdiction of the Admiralty. Whether the sole fact of such usual agreement being by deed alone would take it out of the Admiralty Court, does not appear very distinctly laid down in any case; but it may be remarked,

* Salkeld, 31.

† *Campion* v. *Nicholas*, Strange, 405.

‡ *Cossart* v. *Lawdley*, 3 Mod. 244. The mariner's case, 8 Mod. 379. *Howe* v. *Napier*, 4 Burr. 1944. *Buggen* v. *Bennet*, Ibid. 2035.

that where the Court of Admiralty has jurisdiction over the subject-matter, the mere affixing of a seal to the agreement does not oust the jurisdiction of that Court.* But then again a seal alone does not constitute a deed; a delivery of the instrument as a deed is essential.

But the following observation by Lord Tenterden on this subject, in his work on Shipping, after reciting from all or most of the cases given above, should be noted.

"From this view of the decisions of the Courts at *Westminster Hall*, it appears that a prohibition has not, in any instance, been actually granted, where a contract was upon the ordinary term, merely because it was made by deed (viz. in all cases, as well as being by deed, the terms of agreement therein were especial), but that in each of the cases, the Court considered that circumstance alone to be a sufficient ground for a prohibition; for which the reason seems to be, that as the suit of the seamen in the Court of Admiralty was at first allowed only as a matter of indulgence, and considered as an excepted case, not properly belonging to the jurisdiction of that Court, the exception was confined to the case of ordinary contracts, not made under seal. For, if a contract under seal contain such clauses and covenants only as are conformable to the general rules which govern the administration of justice in the Court of Admiralty, neither the actual existence, nor the legal effect and import of the deed, can become the subject of litigation in that Court. The seamen are not bound to make the deed the foundation of their claim, either by the general course of proceedings in the Court of Admiralty or by the statute; and as it can never be their interest to deny the existence or execution of a deed pleaded by the defendant, containing only the usual terms, upon which their claim would rest, if such a deed

* See *Day* v. *Searle*, and cases *contra* in notis, 2 Strange, 968.

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did not exist, the objection to the mode of trial pursued in that Court, and to the necessity of two witnesses to prove the execution of a deed, can hardly arise."

This observation renders any further consideration, as to whether the mere fact of the agreement for the service of the mariner being by deed, and such deed containing only the usual and ordinary stipulations, unnecessary.

In many cases in the Admiralty Court it was decided that the articles are only "binding and conclusive" (according to the terms of the act) with respect to the wages and the voyage. In other collateral agreements they are not conclusive, and the Court of Admiralty may consider how far they are reasonable and just. A clause inserted in the articles, which provided that if contraband goods were found in the forecastle, the seamen living therein should forfeit their wages and 10*l.*, is not conclusive to work a forfeiture of wages against those not directly proved to be personally implicated in the offence, and the penalty cannot be enforced in the Court of Admiralty; it is the duty of that Court not to put "such a penal construction on the operation of the condition respecting wages, when the owner may, if he is so advised, enforce the whole clause against the seaman by the authority of a court of common law." *

It was by the exercise of its equitable jurisdiction, that the Court of Admiralty was enabled thus to prevent the mariner's claim to wages being frustrated by any agreement contrary to the general maritime law; but, as in the courts of common law a more strict interpretation was applied to these agreements, the cases of hardship upon the mariner were so frequent, that by the 5th and 6th Will. 4. c. 19., new regulations with respect to the wages of seamen were

* The *Minerva*, 1 Haggard's Admiralty Reports, 347.

introduced, but of which, for the subject now under consideration, it is sufficient to mention, that by the 5th section, it is enacted that no seaman, by entering into, or signing the agreement, (as prescribed in the act,) shall forfeit his lien upon the ship, nor be deprived of any remedy for the recovery of his wages, which seamen are now lawfully entitled to, against either the ship, the master, or the owners thereof; nor shall any agreement made contrary to, or inconsistent with the provisions of this act, or any clause whereby a seaman shall consent to forego the right *, which the maritime law gives him, to wages in the case of freight earned by ships subsequently lost, or containing any words to that effect, be valid or binding on any seaman signing the same; and that in cases in which it may be necessary that the agreement should be produced, to sustain a claim on the part of a seaman, no obligation shall lie upon the seaman to produce the same; nor shall any seaman fail in any suit or proceeding for the recovery of his wages, for want of the production of any such agreement, or of any positive copy thereof as aforesaid, or for the want of any notice to produce the same.

By the 15th section of the same act, a summary mode of recovering wages not exceeding 20*l.*, before a justice of the peace, was enacted.

With respect to this section, it was observed by the late Judge of the Admiralty Court, that it was the object of the legislature to assist mariners in a speedy recovery of their wages, and for that purpose to give to magistrates a summary jurisdiction, where the quantum of wages was merely in dispute; but it was not intended to enable them to decide upon intricate questions of forfeiture, whether arising from imputed desertion, disobedience of orders, or from any other cause. †

* The *Prince Frederick*, 2 Haggard's Admiralty Reports, 394.

† The *Edwin*, 3 Ibid. p. 364.

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By a statute passed in the eighth year of her present Majesty *, the act of the 3rd and 4th Will. 4. is repealed, but the same enactments with respect to the mariner's agreement were introduced, but not exactly in the same words. By the 5th section of the former statute, it is enacted that no seaman, by reason of any agreement, shall forfeit his lien upon the ship, nor be deprived of any remedy for the recovery of his wages, to which he would otherwise be entitled, against any person or persons whatever; and no agreement contrary to, or inconsistent with this act, nor any clause, contract, or engagement, whereby any seaman shall consent or promise to forego, or give up any right or claim to wages in the case of freight earned by a ship subsequently lost, shall be valid or binding on such seaman; it is further enacted, that the seaman shall not be required to produce such agreeement or certified copy of the same.

By the 15th section of the same statute, the summary mode of recovering wages not exceeding 20*l.*, before a justice of the peace, is re-enacted, respecting which, the same observation made above and quoted from the case of the *Edwin*, will doubtless apply.

It has been remarked above, at page 124, that the privilege of suing for wages in the Admiralty Court was confined to the mariners, and that such privilege does not extend to the master or commander of the ship, whose agreement for the payment of his service rests upon the personal credit of the owners; but it now becomes necessary to qualify this general rule, by noticing a very important exception made in favour of the master, by the 16th section of the above-mentioned statute, wherein it is enacted, that all the rights, liens, privileges, and remedies, (save such remedies as are

* 7 & 8 Vict. c. 112.

When the owner of a ship is a bankrupt or insolvent, the master may proceed against the ship in the Admiralty Court.

against a master himself,) which, by this act, or by any law, statute, custom, or usage, belong to any seaman or mariner, not being a master mariner, in respect to the recovery of his wages, shall, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master mariners, in respect to the recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects; and that no suit or proceeding for the recovery of wages shall, unless they exceed 20*l.*, be instituted against the ship, or the master, or owner thereof, either in any Court of Admiralty, or Vice Admiralty Court, or any Court of Record in her Majesty's dominions, or the territories under the government of the East India Company, unless the owner of the ship shall be bankrupt or insolvent, or the ship shall be under arrest, or sold by the authority of any Admiralty or Vice Admiralty Court; or unless any magistrate acting under the authority of this act, shall refer the case to be adjudged by any such court or courts; or unless neither the owner nor master shall be, or reside at, or near, the port or place where the service shall have terminated, or where any seaman shall have been discharged or put on shore.

In a very recent case * in the Admiralty Court, there was a question raised as to the meaning of the words "bankruptcy or insolvency" used in this section; it was pleaded that the owner was "insolvent, and unable to discharge the lawful debts due and owing by him, and has so declared and admitted to divers persons." The question was, therefore, whether the owner being insolvent in the general use of the term, and unable to pay his debts, would entitle the master to proceed in Admiralty for his wages, or whether the use of such

* The *Princess Royal*, reported in vol. iv. Notes of Cases in the Ecclesiastical and Maritime Courts, p. 70.

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word in the act, was confined to its more limited meaning under the Insolvent Debtors' Act. *Per. Cur.* "It is an argument of no small weight against that construction of the statute, which is sought to be maintained on the part of the master, that it would lead the Court into investigations of this description, and in many of them, perhaps, it would be exceedingly difficult, with the powers which the Court possesses, to arrive at a perfectly true and satisfactory conclusion." *Re Birmingham Benefit Society* * was quoted. That was the case in which, upon a statute not precisely similar, but resembling the present in many of its main features, the Vice Chancellor was of opinion that the word "insolvency" under that statute, did not mean general insolvency, but was confined to the case of an "insolvent debtor," though there was no word in that statute distinctly confining it to insolvent debtors. *Per. Cur.* "I confess, if the statute had stated that this should be done in cases of bankruptcy or insolvency of the owner of a ship, and if these had been the only words contained in this statute, I might then entertain very considerable doubt upon the subject, and I do not mean now to say, that this is not a case of very great doubt as to the conclusion to which I am about to come. But when I see afterwards, in the latter part of this section, that the words are repeated in the following terms,—'unless the owner of the ship shall be bankrupt or insolvent, or the ship shall be under arrest, or sold by the authority of any Admiralty or Vice-Admiralty Court, or unless any magistrate acting under the authority of this act, shall refer the case to be adjudged by any such court or courts;' when I see these words repeated, I am strongly inclined to believe that the true meaning and effect of this section, is not

Meaning of the term "insolvent debtor."

* 3 Sim. 421.

to give the Court general jurisdiction in all cases to try the question of insolvency, but that the master shall only have a right to resort to an extraordinary remedy, which is now afforded him in the case of the owner becoming an insolvent debtor, in the proper sense of the term, and I will state my reasons. In the first place, it appears generally to have been understood, not only from the case reported in 3 Simons, but when the words 'bankruptcy' and 'insolvency' are taken together, that they are both intended to apply to a certain definitive description of persons, and not merely to a general inability to pay; and in the second place, I do not see that this will operate in the slightest degree as a matter of hardship upon a master suing, and for this obvious reason: supposing this defence was to be upheld, and that the owner in this case should say, by way of defence, 'I am neither a bankrupt, nor an insolvent debtor;' if he is, in reality, insolvent, it is in the power of the master to make him an insolvent debtor, under the provisions of the statute, by taking out an execution against him, and following it up by the other directions contained in the act. Then this statute secures to him his remedy, and he has a right to come here, notwithstanding he has proceeded at common law for the recovery of his wages, and be paid out of the proceeds of the ship in this Court. Therefore, it appears to me, that, in pronouncing against the admissibility of this libel, I carry this statute into full and complete effect, as far as it was intended by the legislature to confer a benefit on the master; and I think that if I carried it further, I should very likely be incurring this risk, namely, that in its operations it would be found so difficult and onerous to determine loose questions of general insolvency, that it might end in the master's being deprived of that

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remedy and benefit, which the legislature intended to confer upon him."

And thus, in another case, it was held, that where an owner had filed a declaration of insolvency in Ireland, which had been published in the Dublin Gazette, but no commission had issued as required by the act 6 Will. 4. c. 14.*, there was no bankruptcy or insolvency in the legal sense of the term; that the arrest of the ship was not good, and the protest to the jurisdiction was pronounced for.† It has also been held that by the words used in the statute, "bankruptcy or insolvency of the owner," is meant the owner at the time of the original contract, and the master being privy to, and not dissenting from, the sale of the ship to a solvent purchaser, is not thereby barred from his action against the ship in the Admiralty Court. ‡

If a seaman take a bill of exchange in payment of wages, he cannot sue the ship in Court of Admiralty if payment of such bill be refused.

In the case of the *William Money*, it was decided that a seaman who had elected to take at Calcutta a bill of exchange on the owners instead of cash in payment of wages, cannot sue the ship on payment of such bill being refused, the owners having become bankrupts. *Per. Cur.* It is pleaded that this man might have taken his wages in money at *Calcutta;* but instead of the money he preferred a bill of exchange as an accommodation to himself: he then made his election and must stand by the risk.

The different kind of persons who are entitled to sue for their wages in the Admiralty Court, being thus particularized, it now becomes necessary to notice a few of the general powers of that Court with respect to these

* By that act a declaration of insolvency is declared to be "an act of bankruptcy in Ireland," but the commission must be sued out within two months after the declaration has been advertised in the *Dublin Gazette.*

† The *Great Northern*, 5 Notes of Cases, 71.

‡ The *Repulse*, 4 Notes of Cases, 166.

suits. The principle that the locality wherein the agreement is made, is not the test upon which the Court of Admiralty has obtained jurisdiction in this respect, has been sufficiently illustrated: nor would the locality of the service at any time apply; for in a very early case we find that where the service of the mariners was from a port of England to London, a prohibition was prayed for in the King's Bench, but was denied, for this must be taken as mariner's wages.* And the Admiralty Court can also maintain a suit, where the ship has never proceeded in the intended voyage; for where seamen were hired to launch and rig a ship, and to go a voyage proposed, and the seamen there continued for four months, fitting the ship out to go to sea, but as the ship never proceeded on her voyage, the seamen arrested the ship by Admiralty process for their wages, and a prohibition was moved for, on the suggestion that the work and labour was done *infra corpus comitatus*, and that as no voyage was made, the mariners could not sue in the Admiralty Court for their wages. Holt C. J. remarked: "Suppose a master of a ship designs to go a voyage, and hires and takes aboard seamen, in order to it; afterwards the owners cannot agree about sending the ship the voyage, and upon that the seamen are discharged, shall not the seamen have the same remedy for their wages, they should have had, if the ship had gone the voyage? The reason of the Admiralty jurisdiction, is, because they are mariners, and are equally entitled to their wages, as if they had gone the voyage; and, therefore, it is plain they shall have the remedy against the ship in that case for their wages." And Powell J. "It is clear that seamen taken on board a ship in order to go a voyage, though the voyage never proceeds, are equally entitled to their wages: and it appears to make no difference

The jurisdiction of the Court of Admiralty in case the ship never proceeds on the proposed voyage.

* 1 Ventris, 343.

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whether the ship was sold or not to the owners, but was still in the builder's hands; for if the builder permits the seamen to come on board, he permits the charge on the vessel. He consents to the charge on the ship, and by his own act makes it liable to the wages." *

In a very recent case in the Admiralty Court, where a mariner had been hired to serve on board a ship on a voyage to the East Indies and back, but was discharged by the master before the commencement of the voyage, two days after the ship's articles had been signed, it is singular that the case reported in *Lord Raymond* was not brought to the notice of the Court. The following is that part of the decision of the present learned judge of the Admiralty Court, which bears upon this point: "In the course of the arguments that have been addressed to the Court, it has been admitted on the one side, that if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which such seaman has been engaged, he would not be entitled to sue in this Court for his redress, but must seek his remedy at common law, by an action on the case. To this position I am disposed to accede, and for this reason, that, in such a case, there would be nothing to show the real amount of loss sustained. The question would strictly be a question of *quantum meruit*. And if this Court was to take upon itself to adjudicate upon the *quantum* of damage sustained, it would be usurping the functions of a jury, to whose consideration the point in question is more peculiarly referable. But, again, there is another case in which it is admitted that the Court has jurisdiction, viz. when a seaman has been taken on board, the voyage been prosecuted, and, during its progress, the seaman has been unduly discharged. In this case it is ac-

* *Wells* v. *Osman*, Lord Raym., 1044. See also *Mills and another* v. *Gregory*, Sayer, 127.

knowledged that the seaman so discharged, may seek his remedy in this Court, and the Court might safely entertain the question, for, in such a case, there would be a standard by which the loss might be decided.

"Now how does this last case differ from the case before the Court? In the one case the seaman might have been discharged at Portsmouth, or the Isle of Wight, or the nearest out port after the commencement of the voyage, and this Court would have jurisdiction to afford him his redress Does it then make any difference, the vessel going the voyage, that he was discharged before the commencement of it? I apprehend not: the amount of damage is to be adjudicated upon the same principle in both cases, and I can see no solid distinction between them, or any reason why I should send this seaman to a court of common law."* The following case at Nisi Prius, before Lord Ellenborough, is in direct conformity with the rule laid down by the learned judge of the Admiralty. An action of assumpsit was brought for wages by a person who had hired himself as mate of a ship at *Liverpool* for a voyage to *Philadelphia*. It appeared that the ship sailed on her voyage, but was under the necessity of putting into *Cork*, not from any uncommon badness of the weather, but from the circumstance of the want of sea-worthiness in the ship, which, on inspection, was found not to be capable of repairs, so that she was condemned and sold, and the voyage abandoned. *Per cur.* "The rule of law is general. The ship must perform her voyage to entitle the seaman to recover; and if the owner sent her out under such circumstances as were stated, it should be the object of a special action on the case; but the

* The *City of London*, 1 W. Robinson's Admiralty Reports, 88. The distinction drawn by Dr. Lushington was between the case of a contemplated voyage abandoned, and that of a voyage prosecuted.

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Court was of opinion, that the sailor could not, on the grounds stated, recover his wages." The plaintiff in this case afterwards proved that, after the vessel was found not to be in a capacity to proceed on the voyage, he was ordered to remain on board until she underwent some repair, which he did, and for which he claimed wages. Lord Ellenborough ruled, that this being a new contract, the plaintiff was entitled to recover on that account as for work and labour.*

The Court of Admiralty has power to decide questions of forfeiture of wages; as well as whether the ship has arrived to a port of delivery.

The Court of Admiralty has also the power of determining, whether or not, the wages of the mariner are forfeited or not. Another question, incidental to this subject, which it is sometimes called upon to determine, is, whether the ship has arrived at such a port of delivery as to entitle the mariners to their wages; and the power of the Admiralty, in this respect, has been recognised by the common law courts. In *Brown* v. *Benn* and *others*†, Powell J. said, he remembered a case of the like nature, where a suit was commenced in the Court of Admiralty by seamen, for their wages, upon the arrival of the ship at *Newfoundland;* and though the merchants all held it no port of delivery, yet the Court of Admiralty held the contrary, and so did the Court of Common Pleas upon a prohibition.‡ And also where loss has arisen from the gross negligence of a mariner, it may be set off in the Admiralty Court against a claim for wages by him.§ In ordinary circumstances seamen's wages are pronounced for, subject to fair deductions for money received or for clothes or other articles furnished; "the

Plea of set off against the demand for wages, by reason of negligence, or of money received.

* *Eaken* v. *Thom*, 5 Espinasse, 6.

† Lord Raymond, 1247.

‡ See the *Pearl*, 5 Robinson's Admiralty Reports, 224.

§ *New Phœnix*, 2 Haggard's Admiralty Reports, 420. Laws of *Oleron*, art. 10. *Consolato del mare*, c 247. Also articles of *Wisbuy* and *les Us et Coutumes de la Mer*, p. 150. in which loss by the negligent use of the ship's ropes is incidentally noticed.

Court of Admiralty is never," said Dr. Lushington, "to be put in the situation of doing an act of positive injustice, namely, to give him the whole amount of his wages, enabling him to put that in his pocket, and set the owners at defiance in respect to what is due from him on a settlement of accounts."* In such cases it is competent for the owners to appear and allege the claims they have against the seamen, and to have those claims investigated before the registrar and merchants, to whom such matters are usually referred by the Court.

But a plea of set off in answer to a suit for wages in the case of the *Lady Campbell* † was rejected. The owner had pleaded a sum as set off, which exceeded the balance claimed by the mariner as due to him (the owner) for the passage of the mariner's wife. The Court rejected this plea as inadmissible, and pronounced for the wages. *Per Cur.* "This Court cannot enter into the merits of this plea; at least I have no recollection of a plea of this description being here received. In cases of wages the Court has an admitted jurisdiction, but this is a question of passage money. The owner must sustain the inconvenience of setting forth his claim in another Court."

All suits for wages in the Court of Admiralty must be brought within six years after the cause of action accrued.

In the Statute of Limitations, no mention was made of the Admiralty Court; but, by a statute passed in the reign of Queen Anne ‡, it was enacted that all suits and actions in that Court shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after; but with this proviso, that if any person entitled to any such suit be, at the time any such cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, im-

* In the *Repulse*, 4 Notes of Cases, 169.

† 2 Haggard's Admiralty Reports, p. 14. *in note.*

‡ 4 *Anne*, c. 16. See Sections 17, 18, 19.

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prisoned or beyond the seas, then they may bring such action so as they take the same within six years next after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas. With respect to this enactment, it has been observed by Lord Tenterden, that the length of time thus allowed may be very inconvenient in the case of a suit against the ship, if the property thereof has been changed. The French Ordinance allows only one year.*

The advantages of proceeding in the Admiralty Court in these cases.

The benefit conferred on the mariner, by allowing him thus to proceed in the Admiralty Court for his wages, obviously demands no lengthened illustration; but the following recapitulation of the advantages of the proceeding in that Court, in claims of this nature, may not form a superfluous conclusion to this chapter. These advantages are principally; the *ship* may be (and usually is) arrested as the security for the demand of the mariner; the proceeding in that Court is *summary;* the seamen may sue either *singly* or *jointly;* where the owners are insolvent, their *security* remains, and their demand is by that Court *preferred to any other claim on the ship*†; they may sue against *proceeds* in the registry; they may also sue the master or the owners *personally;* and, lastly, their interests are *equitably* protected.

* Abbott's Shipping, p. 663, *in note.*

† In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges, for the same reason that the last bottomry bond is preferred to those of an earlier date; the labour of the seaman having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had. Abbott's Shipping, 662. The *Favourite*, 2 Robinson's Admiralty Reports, 232.; *French Ordin.* liv. 1., tit. 14, *de la Saisie des Vaisseaux*, art. 16., and Valin thereon; *Code de Commerce*, art. 192.

CHAP. VI.

ON THE JURISDICTION OF THE ADMIRALTY COURT WITH RESPECT TO CAUSES OF DAMAGE, COLLISION, ETC.

FOR a consideration of this subject it is necessary that the former state of the law, although so happily exploded, should be observed, and we must again refer to the statutes passed in the reign of Richard the Second*, wherein the jurisdiction of the Admiralty Court was confined to things done upon the sea; and the entertaining of all causes of actions arising within the bodies of counties as well by land as by water, was expressly denied to such Court; and these statutes were confirmed by one passed in the second year of the reign of Henry the Fourth.

Until a recent statute, which will be more particularly noticed, the locality in which the injury was committed was the true test by which the jurisdiction could have been determined, and it was not necessary that any other variety or different principle should be introduced to obstruct a clear view of this subject; for a wrong cannot bear the same *duality* as can a contract. Several other considerations might apply to the latter, such as the place where the contract was entered into, and the place wherein the performance of the contract should occur, or the nature of the agreement, &c. &c.; but a wrong or injury done either to the person or the property cannot bear such a twofold aspect; it cannot be committed in two places, and its nature would be the same, whether committed on the high seas or in

* 13 Rich. II., st. 1. cap. v., and 15 Rich. II., c. 3.

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the body of a county, and before the limits of the Admiralty jurisdiction were capable of so distinct a definition as they are at the present day, a difference was always made in that respect between contracts and torts; for although the jurisdiction of the Admiralty Court, in matters of injury or tort, was never interfered with by the superior courts in matters of contract, they attempted to wrest the trident from the Admiralty, and that by a very awkward fiction of law. As an illustration of what is here advanced, it is sufficient to refer the reader to the introductory chapter on the antiquity of the jurisdiction of the Admiralty Court, where this useless struggle between the two Courts is detailed and commented upon.

Although the criminal jurisdiction of the Admiralty Court has been long since abolished, it has always retained (and been encouraged thereto by the superior courts) its jurisdiction in giving damages or compensation for injuries done upon the sea.

Court of Admiralty can entertain causes of damage as well to the person as to the property.

And it appears that the Admiralty Court can maintain causes of damage for injuries as well to the person as to the property. As in the former case, namely, respecting injuries to the person, there have been frequent doubts and difficulties raised as to the Admiralty Court having cognisance over them, it becomes necessary that the authorities upon which this position can be maintained, should be severally mentioned; and in that manner they will receive the full weight to which they are entitled.

In *Le Caux* v. *Eden*, which was a case in which it was decided that no action could lie at common law for false imprisonment where the imprisonment arose from a ship having been taken *as prize*, though the ship was afterwards acquitted and not condemned as *prize*, the point as to whether the Admiralty Court had jurisdiction in cases of injuries to the person

on the high seas was incidentally raised, and the remarks of Justice Willis are very strong in favour of such an injury being cognisable in the Admiralty Court. Having first remarked to the effect that he did not know whether the Court of Admiralty would take cognisance of personal ill-treatment or injury, but that it was very remarkable that no action at law has ever been brought, he continued, "It is said there is no jury in the Admiralty Court to assess damages for a personal injury, but I see no reason why that Court should not judge of such injuries as well as of those which affect property. They have an adequate method of ascertaining the damages by reference to the registrar, who may call in the assistance of assessors." And Mr. Justice Gould also, in the same case, having first mentioned several suits for damage done to the ship, or to the cargo, or goods on board, and remarked that they were not for injuries done to the person, continued: "But that, I think, makes no difference, for the question must be the same in an action for false imprisonment as it is in an action of trespass for taking away the goods or the ship; and the party injured is as much entitled to a satisfaction in the one case as in the other in the Admiralty Court."

A few words may here be said respecting a very prevalent notion, that the Admiralty Court was never assisted by a jury, and that from its proceedings, according to the rules of the civil law, such assistance has always been denied to it. On the contrary, it appears clear that, before the criminal jurisdiction of the Admiralty Court was removed, the proceeding by jury must have been the strict practice. In the Black Book of the Admiralty no conviction is mentioned unless it be by the verdict of twelve men: "*Si un homme est endite qu'il a battu une personne, ou qu'il est un common bateur et malfaiseur en eau salleé;*

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en tel cas s'il est convicte par 12, *il sera emprisoné par* 21 *jours, et plus il fera fin au Roy.*" See also *Articuli Magistri Roughton,* in which articles, after declaring if any should be indicted or detected in such an offence, follows invariably the form of words, "*Si super hoc convictus fuerit per* 12," then ends with a penalty or punishment; in that book, in fact, no one is mentioned as *convictus* unless it be *per* 12. "*Porrecto libello, et sidem responso negative per partem ream, de consuetudine judex potest procedere, ad decidendam causam per patriam. Et tunc judex decernat mandatum emanare, de venire faciendo* 12 *probos et legales homines de vicineto partium prædictarum, rei noticiam melius obtinentes, certo die et loco judiciali coram eo, ad dicendum inter partes quicquid eis constiterit, et super veredictum, dictorum duodecim debet judex conferre sententiam.*"*

This is sufficient to more than bear out the remark of *Justice Willis.*

In the *Ruckers*†, a civil suit was instituted by a passenger against the master for assaulting him on the high seas during a passage from the *West Indies* to *England.* A warrant was taken out against the master on which he had been held to bail (the bail that had been taken in this case was ordered to be reduced to 300*l.*, the plaintiff having laid his damage only at 300*l.* 200*l.*, or at least 100*l.*). An objection was taken on the part of the master to the whole nature of the proceeding, being a personal injury, only fit for the intervention of a jury. The Court (Lord Stowell), on this objection being taken, directed the registrar to look into the records of the Court, to see if there was any

* See note to p. 73. 4 Robinson's Admiralty Reports. In the records quoted by Prynne in his animadversions on the 4th Institute of Coke, there is frequent mention of these convictions in the Admiralty Court before twelve men.

† 4 Robinson's Admiralty Reports, 73.

precedent. The registrar reported that he had searched the records of the Court as far back as 1730: that many instances were to be found of proceedings on damages on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship; and several against persons belonging to other ships (probably sailing in company and accidentally coming on board): that there were other instances of persons proceeding, but without any specification of the capacity in which they stood. From this report, it appears clear, therefore, that it has been the practice to entertain such suits, without reference to the nature of employment or capacity of the parties suing; and that such a suit is not only open to mariners, but apparently to any person damaged on the high seas; and the objection made to the Court entertaining this suit was not entertained.

In *Die Fire Damer* *, which was a suit for damage by wilful negligence of the prize master on account of injuries sustained by the ship, in consequence of the same, the Court also awarded *one hundred guineas* to be divided amongst the crew of the vessel injured (consisting of ten persons), by reason of the cruelty and ill-treatment of the master towards them.

In the *Agincourt* †, a suit was instituted in the Admiralty Court against the captain of an *East Indiaman* for several acts of oppression and cruelty on a voyage from *Madras* to *England.* Such treatment was attempted to be justified on the part of the captain as a necessary correction for offences committed by the mariner; but the Court awarded the sum of *one hundred pounds,* with *costs,* as damages.

The question as to jurisdiction does not appear to have been so much as raised in that case, and from what

* 5 Robinson's Admiralty Reports, 357.

† *Mahon,* 1 Haggard's Admiralty Reports, 271.

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Lord Stowell said, it would appear that these cases were formerly much more frequent in the Admiralty Court than they have been latterly.

In the *Enchantress**, a suit for damages was brought by a mariner on account of a violent assault, by which his ribs had been broken, and he had been otherwise grievously injured. As this was considered by the Court a case of aggravated and unmanly cruelty, without any legal justification, *one hundred and twenty pounds*, with the expenses of the suit, were awarded as damages to the complainant.

In the *Lowther Castle*†, an action was brought by a mariner against the master for personal damage, on the ground of excessive punishment, but the Court held the justification by the master sufficiently established, and dismissed the charge.

In the *Centurion*‡, a charge of ill-treatment was brought against the master of a ship, but not proved, and the complaint was dismissed with costs.

Further than what may be found in the Black Book of the Admiralty §, but which relates to the Admiralty Court before its criminal jurisdiction was removed, it would, perhaps, be difficult to find any further authority in favour of the Admiralty jurisdiction in that respect. But from these numerous cases and authorities for, and without a word against such practice, and undisturbed as it appears to have always been by the superior courts, it may be laid down with safety, that the Admi-

* 1 Haggard's Admiralty Reports, 395.

† Ibid. 384. ‡ Ibid. 161.

§ See the 27th Articulus Magistri Roughton. "*Inquiratur de hiis qui intra jurisdictionem admiralitatis percussit, verberavit vel sanguinem traxit, vel aliquam affraiam fecit, occidit, aut interficit. Pœna pro verberatione seu affraiâ finem faciet secundum discretionem admiralli secundum quantitatem et qualitatem delicti, et pro sanguinis extractione decem solidos nomine finis Domino Admirallo solvet.*"

ralty Court has jurisdiction to award compensation or damages for injuries done to the person.

But such injury, it is conceived, must still take place on the high seas to give the Admiralty jurisdiction, for the sixth section of the statute of Victoria, by which the Admiralty jurisdiction is extended, is confined to damage done to the property.*

The only prohibition which appears to have been applied for in the case of injuries to the person is in *Caton* v. *Burton*†; but the ground upon which the application for prohibition was made, was on suggestion that the assault was committed in the body of a county; but even on that ground the prohibition was denied, by reason that the matter of suggestion was *dehors* the proceeding, and not verified by affidavit.

The Court of Admiralty can entertain a suit for the restitution of goods piratically taken.

And so can the Court of Admiralty entertain a suit *civiliter* for the restitution of goods piratically taken on the high seas, for piracy is not felony; therefore, although it is a known principle of the common law, that a civil suit cannot be founded on a felony, by reason that that would approach to compounding a felony, whereas the civil demand merges in the felony, still a civil suit can be founded on piracy, for piracy is not considered felony at common law. It is expressly so laid down by Lord

* A rather singular rule which formerly prevailed in the Admiralty Court for estimating damage to the person, is mentioned as deservedly obsolete by Lord Stowell in his judgment in one of the cases cited in the following words: "It is within my recollection, that in cases like these, which were formerly more frequent than they are at present in these Courts, it was common for each maritime witness to assign what he thought a proper compensation for a punishment unjustly inflicted, by declaring that he would not take such a punishment for less than such a sum, and estimating the compensation by the value which each man put upon his own individual skin; of course, that was an estimate which afforded little light to the judgment of the person who had to decide the question, and having been discontinued, it now affords him none."—1 Haggard's Admiralty Reports, 288.

† Cowper, 330.

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*Hale. Pardon of all felonies reacheth not piracy.** It was accordingly held by Lord Stowell in the *Hercules*†, that a civil suit for restitution of property piratically taken might be entertained in the Admiralty Court, either exclusively of a criminal prosecution or in conjunction with it. The following is an abridgment of some valuable observations made by the Court in that case.

The present inquiry relates to piracy as understood in the general law of nations, and as consisting, so far as the present application is concerned, in an unwarrantable violation of property, committed upon the high seas. Now that this Court had originally cognisance of all such wrongs, in short, of all transactions, civil and criminal, upon the high seas, in which its own subjects were concerned, is no subject of controversy, for all history of English law supports it. In the reign of King Henry VIII.‡ its criminal jurisdiction was, in great part, removed by statute to a mixt commission,

* See Co. Litt. 391. a. "If this pyracie be tried before the Lorde Admirall in the Court of the Admiraltie according to the civill law, and the delinquent there attainted, yet shall it worke no corruption of bloud, nor forfeiture of his lands; otherwise it is if he be attainted before commissioners by force of the statute of 28 H. 8. By the express purview of that statute about the end of the reigne of Queene *Elizabeth*, certaine English pyrats, that had robbed on the sea merchants of *Venice* in amitie with the Queen, being not known, obtained a coronation pardon, whereby, amongst other things, the king pardoned them all felonies. It was resolved by all the judges of England upon conference and advisement, that this did not pardon the pyracie; for seeing it was no felonie, whereof the common law tooke conusance, and the statute of 28 H. 8. did not alter the offence, but ordaine a triall and inflict punishment, therefore it ought to be pardoned specially, or by words which tant amount, and not by the generall name of felony; and according to this resolution the delinquents were attainted and executed."

† 2 Dodson's Admiralty Reports, 353.

‡ 28 H. 8. c. 15.

but that was the only part so removed. All the civil authority remained as before, for neither that statute nor any other affected it. "All practice of its civil authority *since* that enactment proves the existence of the same practice *before*," for nothing occurred to give it new powers. All the cases produced as authorities were *posterior* to the statute, and the stronger on that account, proving, not only that such a jurisdiction must have existed before it, but, likewise, that it was unaffected, either by that statute itself, or by any succeeding statute then existing. And what seals their authority the more strongly, is, that, upon references to the courts of common law for prohibition, the jurisdiction has been uniformly supported.

Suits in such cases against the *purchaser* of goods piratically taken.

The only question on which doubts have been entertained (and which in one case only was otherwise determined) was, whether goods so illegally taken, could be recovered in a *causa spolii civilis et maritima*, as well against the person who purchased them from the spoliator, as against the spoliator himself. The warrants of arrest in such cases, of which some were referred to by the Court, went out in terms of great latitude — "to arrest the goods in whatever hands they may be found, *per mare vel terram*, or to seize them, *aut provenientia a venditione eorum* in the hands of A. B. of *London*, or wherever else they may be found."

This appears to have been the question in the anonymous case reported by Croke*, and in most succeeding cases: and upon the ground that piracy does not convert property, it appears to have been generally held in the courts of common law, that the extent of the warrants (mentioned above) was perfectly legal. It was otherwise held in the case of the *Spanish Ambassador* v. *Joliffe* and *Tucker* and Sir *R. Bingley*, where *Joliffe*

* Croke. Eliz. 685.

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and *Tucker*, the spoliators, were held bound to answer, but Sir *R. Bingley*, the purchaser, was discharged by Lord *Hobart**; but in the later case of *Egglefield*†, Sir *M. Hale* held clearly, that if goods are taken *piratice* and sold afterwards at land, the Admiralty hath cognisance thereof; for that which is incident to the original matter, shall not take away the jurisdiction, though there were another resolution in *Bingley*'s case; and said that an hundred such suits had been determined in the Admiralty, &c.

In proceeding for restitution there need be no preceding conviction of piracy.

It is not required that there should be a preceding conviction of piracy. It is true that where the Lord Admiral proceeds *pro interesse suo* upon his royal grant of *bona piratarum*, i. e., their own proper goods, not goods of others unlawfully taken on the seas, he must show that the party has been attainted of piracy.‡ But where a person, so despoiled of his own goods, proceeds merely for restitution, no such preliminary is required. "It appears, as far as I can collect it, the settled law that, without a conviction, the party might proceed for what is termed *the point of restitution.* An objection, that no cases in favour of this practice in the Admiralty Court later than the time of *Charles II.*, were to be found in the reports, was dismissed by Lord Stowell with the following remarks: "In truth it is hardly to be expected that they should have occurred in the common law reports, after the law had been so defined and settled in the several cases of prohibition attempted and decreed; for it could only be in cases of prohibition that they could have appeared in these books. In our own jurisdiction printed reports are only of yesterday, and little of any standing is to be found, but in the records at the Tower, many of them very obscure or imperfect, or in occasional references to

* Hob. Rep. 78. † 1 Ventris, 173. 2 Keble, 828.

‡ *Peinston and others* v. *the Admiralty*, 3 Bulstrode, 147.

tradition or personal memory, or written notes collected by former industry. It is to be observed, likewise, that piracy has long ceased to be practised in any considerable extent. There is said to be a fashion in crimes; and piracy, at least in its simple and original form, is no longer in vogue. Time was when the spirit of buccaneering approached in some degree to the spirit of chivalry in point of adventure; and the practice of it, particularly with respect to the commerce and navigation, and coasts, of the *Spanish American* colonies, was thought to reflect no dishonour upon distinguished *Englishmen* who engaged in it. The grave judge* observes, in a strain rather of doubtful compliment, *nulli melius piraticam exercent quam Angli.*† But whether the numerous fleets which, in later times, have been maintained by the *European* states, or the prevalence of juster notions, and gentler manners, and commercial habits, have cleared the ocean of this nuisance, the fact is certain, that the records of our own criminal courts show that piracy is become a crime of rare

* Scaliger.

† Selden has observed that "pirates" did not mean sea robbers in its modern sense, but that the term was used originally for distinguished seamen. Mare Claus. lib. ii. c. x. "The pirates of the eleventh and twelfth centuries were common to all the maritime nations of Europe, and appear to have consisted of bodies of skilful seamen, whose ships committed hostile aggressions, as well against their own countrymen and allies as against the enemies of their sovereign, whenever an opportunity of obtaining booty presented itself. That they were not always, as has been supposed, outlaws, is nearly certain, for the king often availed himself of their services, though his efforts to control or punish their outrages were sometimes vain." Sir H. Nicolas, History of the British Navy, vol. i. p. 240. In relating some maritime excursions of William II. against his brother Robert of Normandy, both Hoveden, 264., and Bromton, 986., call the English ships "piratæ." "William jam mare munierat suis *piratis* qui venientes in Angliam tot occiderunt et in mare merserunt,"—"Anglici vero *piratæ* qui curam maris a rege susceperant," &c.

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occurrence, hardly visible for above a century past, but in the solitary instances of a few obscure individuals. Pirates, in the ancient meaning of the term, are literally *rari nantes* on the high seas. Under these circumstances, both of the settlement of the law and of the rarity of the fact, it is no marvel that cases of piracy, turning at all upon this question of jurisdiction, should hardly present themselves at all in the later books. If the cases had occurred, in fact, one sees no reason for supposing that they should not have received the same consideration to which their predecessors had been subjected."

Damage by collision, &c.

But another species of damage to the property, for the reparation of which a frequent recourse is had to the Court of Admiralty, arises in causes of collision or injury done to or received by a ship; here, as in all other cases of damage, the locality in which the damage occurred was the test by which the jurisdiction of the Court was confined and limited; for those damages, which occurred within the bodies of counties, the Admiralty had no jurisdiction. But by a recent statute, which has often been mentioned in this treatise and is printed in the Appendix, a more rational principle was applied to these causes, by which the locality in which the injury was received does not found the jurisdiction of the Admiralty Court; for, by the 6th section of that statute, it is enacted that the Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever, in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received in respect of which such claim is made; all the old statutes and other authorities respecting locality, *infra corpus comitatus*,

The Court of Admiralty has jurisdiction for damage done to a *ship* or *sea-going vessel*, whether or not such ship be *infra corpus comitatus*.

infra primos pontes, flux and reflux of the sea, &c. &c., are thereby overruled.

It becomes necessary that we should now mention the several statutes which relate to the reparation of those injuries which are the subject of discussion; some of them having been considered, it will be observed, restrictive of the jurisdiction of the Admiralty Court. The following sketch by Lord Stowell will bring them forward in the most succinct manner.

"The quantum of reparation due in such cases has been differently measured in the maritime laws of different commercial countries, and of the same commercial country—amongst others, our own—at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage, knew nothing, and over whom they had no control. To this rule our own country conformed; and it is not to be denied that the term *compensation* is not very accurately applied to any restitution that falls short of a fair and full indemnification for the injury done. But *Holland* having introduced a law for the protection of its navigation, that persons interested in it should not be liable beyond the value of that property of their own which they exposed to hazard—their ship, freight, apparel, and furniture,—*England* followed in successive statutes by which it protected owners from responsibility beyond those interests, first, in the case of embezzlements committed by some of the crew of the ship herself*; and in a succeeding statute† this protection was extended to the

* 7 Geo. 2. c. 15. † 26 Geo. 3. c. 86.

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case of embezzlements committed by other persons. The legislature proceeded in a later statute to give the same protection in the case of all losses otherwise produced."

"Anciently the owners were, under the general law, civilly answerable for the total loss occasioned by the negligence or unskilfulness of the persons they employed; but the avowed purpose of the relaxation of this rule of law was, to protect the interests of those engaged in the mercantile shipping of the state, and to remove the terrors which would otherwise discourage people from embarking in the maritime commerce of a country, in consequence of the indefinite responsibility which the ancient rule attached upon them. It was a measure evidently of policy, and established by countries for the encouragement of their own maritime interests." *

The responsibility of owners is limited to the value of the ship,

By that statute, 53 Geo. 3. c. 159., the responsibility of ship-owners in an action for damage by collision is limited to the value of the vessel doing the damage, and to the freight due or to grow due for the then voyage; and it was decided in the *Richmond* †, that such responsibility was not extended by the owner's having given bail unconditionally in a sum *plus* the real value, to answer the action. But as it frequently happens that the master of the vessel doing the damage is as well the part-owner, it becomes necessary that we should observe what is the authority of the Admiralty against him, and how far he may be made liable in a proceeding in the Admiralty Court against the ship; it will be seen, in the course of this inquiry, that the persons suffering by the damage may proceed in Admiralty against

and not extended by bail being given in a sum *plus* such value.

* By Lord Stowell in the *Carl Johan*, where it was held that the privilege as to owner's liability applied only to *British* ships, but did not extend to foreign ships or to foreign owners. See 1 Haggard's Admiralty Reports, 103.

† 3 Haggard's Admiralty Reports, 431.

the ship, or they may proceed against the owners personally, or the master personally. The question which is at present under consideration is, as to how far (if at all) the Admiralty Court can engraft such personal proceeding upon an action *in rem.*

A recent case in the Admiralty Court on this subject should be mentioned here, as incidentally it affects the jurisdiction of the Court; and as therein are embodied the previous decisions on the subject, the whole will be better brought to the notice of the reader (it is conceived) by an abridgment of that case.*

The vessel was arrested by process issuing from the Admiralty Court in a cause of damage by collision; an appearance was entered for the owners, and bail was given in the amount of the value of the wrong doing ship. The Court, assisted by Trinity Masters, was of opinion, that the damage was caused by the neglect of the *Volant* (the vessel proceeded against), but made no decree: a question being raised with respect to the liability of the owners of the damaging vessel to make good the damage beyond the amount of the value of the ship, such value being insufficient to cover the amount of the damage, the Court was therefore prayed to decree also against the master of the *Volant,* who was a *part-owner* of, and as well commanding, the vessel doing the damage: in support of this application was cited the case of the *Triune* †, decided by Sir J. Nicholl, and *contra* was cited the *Hope.* ‡

In the former case the vessel had been arrested and no bail given, but an appearance was entered on behalf of the master, the principal owner. The Court pronounced against the vessel arrested, and condemned the master, the vessel, and freight in the damage and in the

* The *Volant,* 1 W. Robinson's Admiralty Reports, 383.

† 3 Haggard's Admiralty Reports, 114.

‡ 1 W. Robinson's Admiralty Reports, 158.

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costs The ship was sold, and the proceeds were insufficient to cover the amount of the damage in the extent of 400*l.* A monition was then decreed against the master for that sum, and he was subsequently attached and imprisoned. This case was contrasted with the case of the *Hope;* by reason that here an appearance was entered by the master, the principal owner, only. And again, no bail was given, and Sir J. Nicholl inquired whether there was any precedent for the application for the attachment; and when the attachment was decreed, no reasons were given and no case cited.

In the more recent case decided by the present learned Judge of the Admiralty, an appearance was given for three part-owners resident in Scotland. The damage was between 1300*l.* and 1400*l.*: bail was given in 1500*l.* and the value of the *Hope* was 810*l.* The master and part-owner was on board at the time, and the collision arose from his own fault and misconduct. The *Triune* was not referred to, but the Court was of opinion, upon the general principles upon which the proceedings of the Court of Admiralty are conducted, that it was incompetent for the Court to engraft a personal action against the master as part-owner upon a proceeding *in rem,* to make him responsible for the excess of damage beyond the proceeds of the ship; it was clearly the opinion of the Court that it did not possess such a jurisdiction.

There being this difference of opinion entertained in these two cases, the circumstances of which were generally similar, the present learned Judge considered the question perfectly open, and decided the question without being concluded by either of the above-mentioned cases, and gave his opinion on the general authorities and principles, of which it is necessary to mention the following: By the ancient maritime law,

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the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation, the owners of the damaged vessel might resort either to the courts of common law, or to the Court of Admiralty; and if they preferred the latter, they had their choice of three modes of proceeding, viz. against the owners, or against the master personally, or by a proceeding *in rem* against the ship itself. The Court of Admiralty has jurisdiction over the whole subject-matter of damage on the high seas, and the arrest of a vessel is only one mode of proceeding. The damage confers no lien upon the ship, but an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment. There may be cases in which it would be almost necessary to proceed in this Court, and in which there could be no other effectual remedy, although the ship could not be arrested; for instance, a foreign ship doing damage, where it would be impracticable to bring an action at law; the crew might be dispersed, and the expense of producing them as witnesses too onerous to be borne; or in case of the ship doing the damage being lost or sunk immediately after the collision, there is no reason why an action should not be maintained in the Admiralty Court, although the ship may not be arrested. The jurisdiction of the Admiralty Court does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality. But if the proceeding be by arrest of the vessel, it is clear that if no appearance be given to the warrant arresting the ship, there can be no proceedings against the owners; the Court cannot know who are the owners, and cannot exercise any power over persons not personally cited to appear. "Where there is an

In these cases the proceeding may be against the owner, the master, or the ship itself.

If the proceeding be against the ship, and no appearance be given for owners, there can be no proceeding against them.

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If in the same case an appearance be given for them, and bail be given, they cannot be made further responsible.

appearance to the action and bail given, as to the bail, the decree cannot be extended beyond what they, who are strangers to the cause, have voluntarily made themselves responsible for; but in a case where the owner has appeared, the question is, to what extent he has appeared to the process against the ship." The process decrees *the ship to be seized, and cites all persons having, or pretending to have, any right, title, or interest therein, to appear in, &c. on, &c., there to answer in a cause civil and maritime.* The owners are cited to their right, title, and interest in the vessel, and no further. If it were possible to demand bail beyond the value of the ship, or if the process went to make them responsible beyond such value, there is no reason why bail should not be commensurate with the damage, when the amount is not restricted by the statute. But if bail could not be demanded beyond the value of the ship, how can the owners in that proceeding be made further responsible? the warrant of arrest is confined to the ship: it goes no further. It was held, therefore, that there was no personal liability beyond the value of the ship, by reason that the original process obviously would not justify any such proceeding, and the appearance given by the individual could no more justify it, for he had appeared only to protect his interest in the ship; that to render a master part-owner, guilty of neglect, responsible beyond the value of ship and freight, he must be sued as master, and charged as the cause of the damage in the first instance; but, that that cannot be done, directly or indirectly, in another suit.*

And thus to render a master part-owner guilty of neglect, responsible beyond the value of the ship, he must be sued as such in the first instance.

* The case of *Wilson* v. *Dixon*, reported in 2 Barn. & Adol., was particularly cited in this judgment. That was an action against several defendants as ship-owners for damage sustained by the loss of goods taken on board their ship; and the question was, whether, under the 53 Geo. 3. c. 159. above mentioned, the carriers were liable beyond the value of the ship and freight, by reason that the master was part-owner, and the

The owner's liability extends to the *appurtenances* of the ship. What are appurtenances?

The *Dundee*, a whaling ship, bound on a voyage to the Greenland fisheries and with her *fishing stores* on board, came in collision with a smack, and the *Dundee*, her *tackle, apparel* and *furniture*, were arrested in the Admiralty Court for such damage, to answer an action entered in the sum of 9000*l.* The Court having decided that the *Dundee* was to blame, condemned the owner and the bail in the damage; but a question was raised and fully argued, whether, as well as the *sailing* stores which are necessary for the general purposes of navigation, her *fishing* stores, namely, fishing-boats, tackle, harpoons, lines, rockets, &c. &c., could be held liable to contribute to this damage. The ship, her tackle, &c. were valued at 2685*l.* and the fishing stores at 2236*l.*, and bail was given in 9000*l.*, the amount of action entered, but with an express reservation as to the liability of the fishing stores.

The statute subjects the *ship, tackle, apparel*, and *furniture*, and its *freight* in the first enacting clause, but in the following clauses, particularly in the 7th and 8th, the word *appurtenances* is introduced, and is repeated as subject to contribution.* It was held by Lord Stowell, in a most elaborate judgment, that these fishing stores were *appurtenant* to the ship; that they were indispensable instruments, without which the ship could not exe-

loss occasioned by his misconduct: the Court of King's Bench determined in the master's favour. Justice Bayley said: "The meaning of the clause is, that if the master be a part-owner, his responsibility, if you sue him in his character of master, and not as one of several part-owners, will not be affected by the first section of the act; but if you sue him as one of the part-owners with the other part-owners, the circumstances of the loss being occasioned by his fault, and with his privity, will not take away from the other part-owners the protection which the 1st section of the statute intended to give them."

* The 53 Geo. 3. c. 159. s. 1. is to be construed as if the words, "with all her appurtenances," had been inserted after "ship or vessel," as in s. 7. *Gale* v. *Laurie*, 7 D. & R. 711.; 5 B. & C. 156.

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cute its mission and perform its functions, and therefore were liable to contribute to the damage. That as there are some things *universally* appurtenant to the ship, be its occupation what it may; so may particular things become so from their immediate and indispensable connection with a ship in the particular occupation to which she is destined, and in which she is engaged. That the mode of initiating a suit by arrest of a *ship*, its *tackle, apparel,* and *furniture,* was the ancient formula of the Court, leading to a full remedy, affecting all the property of every kind of the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted, than as the statute restricted it, that the initiatory terms, tackle, apparel, and furniture, founded the suit sufficiently to enable it to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions; the same words must go, therefore, as far as the general law, limited by the statute, extends.* The Court having pronounced these fishing stores liable to contribution, the owners applied to the Court of King's Bench for a writ of prohibition. The Court of King's Bench refused to interfere in that summary way, directed the plaintiff to declare, and ultimately gave judgment for the defendant. A writ of consultation was, therefore, brought into the Court of Admiralty, in which the opinion of the Court of King's Bench was given to the effect that the fishing stores on board the *Dundee* at the time of the loss and damage, were part and parcel of the ship's appurtenances and freight according to the true intent and meaning of the 53 Geo. 3. c. 159., and that the Admiralty Court might proceed with the suit.†

* The *Dundee*, 1 Haggard's Admiralty Reports, 109.

† *Gule* v. *Laurie*, 5 B. & C. 156.; 7 D. & R. 711.

The owner is also liable beyond the value of the ship, to the costs the sufferer incurs in recovering that value; and to interest, if payment is delayed.

But the subsequent proceedings in the case of this same ship must be noticed, as materially affecting the jurisdiction of the Court under the same act: they arose in the form of objections to the report of the registrar and merchants. There were three objections, of which it is only necessary to mention the third, which was, that they (the owners) could not be made liable for costs and interest beyond the value of the ship. But it was held by the Court, that although the responsibility of owners was limited to the value of the ship, that the sufferer was entitled to such costs as he should incur in recovering that value, and to interest, if payment be delayed.*

The same point came before the present learned Judge of the Admiralty Court in the recent case of the *John Dunn* †, which was a cause of collision, in which the vessel proceeded against was sold under a decree of the Court, but the proceeds were insufficient to pay the damage; the Court was then prayed to decree interest from the time of the collision, and to condemn the owner of the *John Dunn* personally, in the costs of the action. This application was opposed, and a distinction was contended for between the present case and the *Dundee*, inasmuch as in that case bail had been given, and the decree went against the owner, and also the bail for the damage and the costs. That no bail had been given in this case; that the proceeds of the ship and her appurtenances had been given up in this case. It was further contended, that if the Court acceded to the present application, it would, in effect, depart from its original sentence, if it engrafted upon it a personal monition against the owner of the vessel.

The Court held that such circumstance created no

* The *Dundee*, 2 Haggard's Admiralty Reports, 137.

† 1 W. Robinson's Admiralty Reports, 159.

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real distinction between the two cases; that the liability of the bail in the *Dundee* was founded upon the personal responsibility of the owner; that such responsibility, being governed by the statute, could not have been increased by the fact of the ship having been bailed, and by the bail undertaking to do more than the statute imposed. As to the point that by condemning the owner of the *John Dunn* personally in the costs of this action, the Court would alter its original decree,—*held* no greater alteration than the circumstances of the case demanded. The first step in these cases is to condemn the property; and the present question could never arise till the property was sold, and the proceeds found deficient. Again, the owner had appeared and litigated the case. A different consideration might apply, if no appearance had been given, and the proceedings had been *in pœnam* against the ship; but as the owner of the *John Dunn* has taken the chance of the litigation, and of a decree in his favour, he is fairly liable for the expenses occasioned by his defence.

The owner was therefore condemned personally in costs, but no order was made with respect to the interest claimed from the time of the collision.

Upon this decision a prohibition was moved for, in the Court of Queen's Bench, and a rule *nisi* having been granted, was argued and determined in that Court.* Lord Denman, delivering the opinion of the Court, stated the question to be, whether, upon the first sect. of 53 Geo. 3. c. 159., confining liability of shipowners to the value of the ship and freight, included the costs of recovering compensation, whether by suit against the owners themselves, or against the ship as well as the compensation itself, or whether the owners are personally liable for such costs, although they should

* Exparte *Rayne*, 1 Gale and Darison, 374.

exceed the value of the ship and freight. The following is the ruling of their lordships: —

"The words of the section seem to apply more naturally to the actual loss or damage immediately resulting from the thing done, omitted, or occasioned; and as costs are mentioned in the other clauses of the act, but not in this, we see no reason for thinking that the legislature intended to include them. Great temptation to vexatious litigation would be held out by deciding that they were included; and our opinion that they are not, is strengthened by the express decision of Lord Stowell in the case of the *Dundee*. We agree with that learned lord in the view which he has taken of the statute, and this rule must be discharged."

Where a ship is condemned in a cause of damage, and the proceeds insufficient, the Court of Admiralty has no such equitable jurisdiction, as to decree a rateable distribution among all the sufferers, where some were not parties to the action, and thereby to take away the privilege of the *prior petens*.

By the seventh section of the same statute, a power is given to the owners to file a bill in equity, to ascertain the amount of the value of the ship; and by the fifteenth section it is enacted, that if any suit for any loss or damage shall be instituted or depending in any court competent to act as a court of equity for the purposes of this act, such court is empowered to proceed in such suit for such purposes in the same manner, and under the same regulations, and with the same powers as are herein given to courts of equity, so far as the same are applicable to the nature of such court, and the forms of proceedings therein; and such court shall use all such means as a court of equity is by this act empowered to use for the purposes of this act. In the case of the *Saracen* *, that ship was condemned in a cause of collision by reason of damage occasioned by her; the action was brought by owners of the damaged ship, and owners of part of the cargo; the owners of the rest of the cargo were not parties to the

* 4 No. Ca. 498., and on appeal to the Privy Council in 11 Jurist, 253.

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action, but on the same day that the decree was made they applied to be let in to share rateably in the proceeds of the condemned ship * (the proceeds were insufficient to defray the amount of damage). It was held that the decree for damage condemning the ship was a final decree, and that the Court of Admiralty, though it may in certain cases give weight to equitable considerations, had no equitable jurisdiction whereby it could, in the present case, decree a rateable distribution, and thereby take away the priority of the *prior petens*, and that the act 53 G. 3. c. 159. was passed for the protection of owners of ships, and appears to apply only to bills in equity and suits or proceedings instituted *by or on behalf of the owners*. "The fifteenth clause may be applicable to suits for damage in the Admiralty, accompanied by a proceeding on the part of the owners for their own protection, and which may lead to a distribution *pro ratâ* of the proceeds of the ship among the claimants. But there is no such proceeding here. The action of the respondents (the owners of the damaged ship) was brought by them as individuals for their own benefit."

The Pilot Act.

The jurisdiction of the Court must now be observed under another very important statute, viz. the Pilot Act, by which a duly licensed pilot being in charge of a vessel, the owners are expressly protected from any responsibility or liability for loss or damage which shall happen by reason of any neglect, default, incompetency, or incapacity of any licensed pilot in charge of the ship. But it has been determined that this does not affect the jurisdiction of the Admiralty Court against the ship, such jurisdiction being expressly reserved in the act. And where a case of collision has occurred, the wrong-doing ship is still liable to be arrested for the damage,

Notwithstanding the Pilot Act, the ship is still liable to be arrested in the Admiralty Court, although a duly licensed pilot be on board.

* An alleged agreement between the proctors that they should so share was held totally insufficient for such purpose.

notwithstanding that a duly licensed pilot was in charge of her; for the damage may have occurred partly by the misconduct of the pilot, and partly by that of the master and crew of the vessel; so that the point as to whether the ship is liable to be arrested for damage or not, by reason of a pilot being on board, is not a matter of protest, or, to speak less technically, is not such defence as will entitle an owner to protest against the Court of Admiralty entertaining the question; for the statute only relates to damage done by the neglect, &c. of the pilot, and it cannot appear whether the injury done is of that nature, until an opportunity is given to the other party of replying to that averment.

The purport of the act is to take away the liability from the owners of a vessel, when damage is occasioned by the fault of the pilot *alone*.

"This exemption in favour of the owners is undoubtedly a departure from the general law as it formerly prevailed in this Court, but the principle upon which it is founded is just and reasonable. Where the appointment rests with the owner himself, as in the case of the master and crew, it is reasonable that he should be held responsible for their acts, who are agents selected by himself, and he is bound to provide persons of adequate skill, diligence, and sobriety. But where a person is compulsorily put on board the vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety, and caution of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any possibility of interference." This observation of the present learned Judge of the

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Admiralty is supported by three cases at common law.*

But it is not sufficient in the first instance for the owners of a vessel doing damage to allege merely that there was a licensed pilot on board, and by that averment alone to claim exemption from liability, unless the other side can prove the damage not to have arisen from the neglect, &c. of the pilot. And it has been held that the owners are bound to prove the misconduct of the pilot. "The ancient rule of the Admiralty and Common Law are not abolished. The effect of the act is merely this, that the liability is restricted to certain cases; * * * * But the great principle, that a wrong-doer is responsible to the injured party saving in the excepted cases, continues unaltered. Is it not incumbent, then, upon the parties who claim an exemption from a general liability by reason of a special legislative enactment, to show the grounds on which the exemption is claimed? and if, as in these cases, the exemption is rested upon the fact that the accident was the fault of a pilot on board, are they not bound to prove the misconduct of that pilot? Can the Court infer in all cases that a collision arises from his fault? It may be accidental, or arise from the fault of the master or mariners, or even from some defect of the vessel itself. How can I throw the *onus probandi* on the owners of the vessel which has received the damage? It is almost impossible they could prove it. The accidents, in cases of this kind, most frequently occur in the darkness of the night: in such cases, then, how is the owner of the suffering vessel to prove that the collision arose from the fault of the master, or the neglect or misconduct of the crew on board the vessel by which the damage is occasioned? He has no means of so doing, and it

It is not sufficient for the owners to allege that a pilot was on board; they must also allege that the accident occurred by his fault; and the *proof* of this allegation is upon them.

* The *Attorney General* v. *Case*, 3 Price; *Mackintosh* v. *Slade*, 6 Barn. & Cress.; *Carriethers* v. *Sidebottom*.

would, I conceive, be an aggravation of the injury, if this Court were to impede the attainment of his redress by imposing demands upon him, which, in the majority of instances, he would be wholly unable to satisfy." * (The Northampton, 1 Ecc. & Ad. Rep. 18)

Damage done to and by foreign ships.

The statutory restrictions above mentioned, have at present been considered only with reference to British ships; for as to foreign ships, it is to be lamented, that the judicial determinations of the Admiralty Court on that subject are not easily reconciled.

It has been judicially determined by Lord Stowell, that the privilege conferred by statute on owners of ships, viz. that they shall not be liable for damage done, beyond the value of the wrong-doing ship, does not extend to foreigners, and that foreign owners are as much liable beyond the value of the ship, as if the

* *Per* Dr. Lushington in the *Protector*, 1 Wm. Robinson's Admiralty Reports, 45. Notwithstanding the previous cases on the subject, what is stated in the text is clearly the present law on the subject. In the *Protector*, the present learned Judge of the Admiralty Court went through all the cases which had been decided before, the first being the case of *Neptune the second*, reported in 1 Dodson's Admiralty Reports, which, although occurring two years after the statute had passed, was clearly decided without reference to it, and therefore no authority on the point. The *Christiana*, reported in 2nd vol. of Haggard's Admiralty Reports, a decision by Sir C. Robinson, and the *Transit*, decided by Sir J. Nicholl, being irreconcileable with that case, they were therefore conflicting decisions. The cases of *Bennet* v. *Moita*, and *Ritchie* v. *Bonsfield*, were also commented on by the learned judge, in neither of which cases were the difficulties which the owner of the suffering vessel must encounter in any degree noticed. The learned judge continued:—"I confess, that in my judgment, the defence to an action of this description, in this Court at least, must extend beyond the limit in which the authority of these cases would confine it. In my view of the subject, it is not a sufficient defence merely to allege, that a pilot was on board the vessel doing the damage, at the time the accident occurred. To bring himself within the exemption from liability conferred by the statute, the defendant must go further, and show that his case comes within the purview of the present law, and that the damage arose according to the very words of the statute, from, or by

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statute had never been passed *; that "the new rule was one of domestic policy, and that with reference to foreign vessels, it only applied where the advantages and disadvantages of such a rule were common to them and to British vessels; that if all states adopted the same rule, there would be no difficulty, but that no such general mutuality was alleged; that if the law of Sweden adopted such a rule, it would apply to both countries, but that Sweden could not claim the protection of that statute, without affording a similar protection to British subjects in similar cases."

With respect to the exemption of owners for reparation of damage caused by the negligence of a pilot, when the act conferring such exemption was new to the courts of justice, it was decided in the first instance that such privilege applied to foreign vessels †; in the next case ‡, where an Austrian vessel having a duly licensed pilot on board had run down a British vessel, the fact of her being a foreign vessel was held sufficient to prevent the privilege of non-liability conferred by statute to extend to her owners: the grounds upon which such decision was come to, appear to have been that a foreigner could not, in a suit in the Admiralty Court (a court governed by the law of nations), set up as a defence a municipal law made to regulate municipal courts only, and contrary to those general rules of law which prevail amongst commercial nations; *that* re-

reason, or means of some neglect, default, or incapacity of the pilot so taken on board."

* The *Carl Johan*. There is no full report of this case: it is cited in argument in the 1st vol. of Haggard's Admiralty Reports, p. 113., and more fully in the sentence given in the *Girolamo*, 3rd vol. Ibid., p. 186.

† *Christiana*, decided by Sir Christopher Robinson; reported, 2 Haggard's Admiralty Reports, 183.

‡ *Girolamo*, 3 Haggard's Admiralty Reports, 169.; decided by Sir John Nicholl.

ciprocity, or mutuality, has always been considered as one of the leading principles of justice in questions arising between nation and nation. "If, indeed," said the learned Judge, "it had appeared that a British vessel sailing out of Trieste * with a pilot on board, and doing damage to an Austrian vessel, would not be liable to make good the loss because such British ship had a pilot on board, it might have varied the case, more especially if there were any treaty or convention, or any practice inferring that such rule should be mutually observed; but there is no such suggestion; and therefore the general rule of law 'that owners are responsible' must be considered as the existing principle in this case."

But the several cases following, decided by the present learned Judge of the Admiralty Court, from the uniformity of principle recognisable in them, although they do not reconcile those already cited, not being exactly on the same point, sufficiently elucidate the subject under discussion. In the first place we observe, that questions of *collision* are *communis juris*, and that the principles applicable to them are different from those which depend on the municipal laws of the states in which the contract is made; as in a wages' suit for instance.

Questions of collision are *communis juris*.

In the *Johann Frederick* † the jurisdiction of the Court of Admiralty was denied, by reason that both the vessels were the property of foreign owners, and it was said in the course of the argument, that the Court of Admiralty was not desirous of exercising its jurisdiction between foreigners; and in support of this doctrine, some observations of Lord Stowell in cases of seamen's wages were cited; but those cases were held distinguishable from the present, and the following reasons were given by the learned Judge: that all

* The port to which the vessel doing damage belonged.

† 1 W. Robinson's Admiralty Reports, 36.

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questions of collision are questions *communis juris*, but in cases of mariner's wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not.

In the *Vernon* *, which was a suit brought by a Norwegian vessel against the *Vernon* for damage occasioned by collision; the cause being heard upon its merits before Trinity Masters, the Court pronounced the Trinity pilot in charge of the *Vernon* alone to blame; it was urged by counsel for the owners of the foreign vessel, that the provisions of the general pilot act did not apply, the vessel receiving the damage being foreign; that such circumstance furnished an important distinction, and entitled the claim of the foreign vessel to the indulgent consideration of the Court of Admiralty, because there is no reciprocity, and if resort had been made to a foreign court, the decision would have been different. In answer to this, it was observed by the learned Judge, that, "upon the general principles of international law, whoever sues in the courts of any country must take the remedy which the law of that country allows. If a contract is made abroad, it may be expounded by the law of the country where it was made, or by the law of the country where it is to be executed; but where a remedy is sought to be obtained, the parties seeking it must take it according to the law of that country in which it is to be enforced. This principle is distinctly laid down in the case of *Don* v. *Lipman*, which is reported in the fifth volume of *Clark and Finelly*, p. 1. The judgment in that

* 1 W. Robinson's Admiralty Reports, 35.

case was delivered in the House of Lords upon grave deliberation, and the decision embraces all the authorities upon the subject. The question in that case was this: Whether upon certain bills of exchange which had been given in France, but which were to be enforced against the acceptor in Scotland, the Scottish law of prescription applied, more than six years having elapsed between the time when the bills became due, and the action was brought. It was the opinion of the House of Lords that the remedy could only be obtained according to the law of the country in which the suit was to be entertained. The principle laid down in the case to which I have just adverted is, I apprehend, conclusive upon me in the present instance. I must consider myself bound by the decision in the House of Lords; and I wish it to be understood, that in all cases which may be brought before me, I shall endeavour to administer equal and impartial justice, whether the subject matter of the action be the property of British or of foreign owners."

In the case of the *Maria**, the owners of a foreign vessel were held not liable for damage caused by the neglect of a duly licensed pilot, taken on board under the provisions of the Newcastle Pilot Act. The following is the forcible conclusion of the judgment delivered in that case: "It would be contrary to all sense of equity to say to the owners of a foreign vessel — You shall take a pilot of our selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing."

Consequential damage.

The Court of Admiralty has also the power of awarding damage *consequential* to the collision; for although

* 1 W. Robinson's Admiralty Reports, 95.

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an objection was made in the *Betsey Caines**, that such power was not within the authority of the Admiralty Court, that objection was not sustained: it was a case in which a smack, whilst engaged in a salvage service, was run down by the vessel proceeded against; and, therefore, as well as suffering by the loss of the smack, her cargo, &c., the owners had sustained a further loss by not being able to complete the salvage service in which she was actually engaged: in answer to the objection that the Court could not inquire into consequential damage, the following are the forcible observations by Lord Stowell: "No authority has been mentioned by which the Court might be induced to consider itself excluded from entertaining a question of consequential damages, and I cannot persuade myself that the jurisdiction is so limited in this respect as the argument would suggest. Besides, this is not a mere claim for consequential and probable advantage only, for the smack was actually in the pursuit of earning that, which it had been stipulated she should receive."

In the *Yorkshireman, Foreman,* a case of collision, in which it was alleged, that a fishing smack was run foul of by the steam-boat while the smack was on a voyage from London to Norway to receive a cargo of lobsters, and that from her damage it became necessary to hire another smack for that purpose,—the Court (having condemned the owners of the *Yorkshireman* in the amount of repairs and in costs), after argument, directed a reference to the registrar and merchants to report the amount of freight paid to the vessel substituted for the fishing smack, in order that the same might be allowed as consequential damage.†

* 2 Haggard's Admiralty Reports, 18.

† 2 Haggard's Admiralty Reports, 30. in note. But see the *Eolides*, 3 Haggard's Admiralty Reports, 368., where the Court refused to pronounce for damage to a cargo on board the vessel

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Advantages of proceeding in the Admiralty Court in these cases.

Although in causes of this nature the courts of common law have jurisdiction concurrent with that of the Admiralty, the security which is offered by the proceeding in the latter Court is sufficient to have made it the one more usually resorted to.* But another advantage of the proceeding therein, compared with the courts of common law consists in this:—If a collision be caused by reason of neglect, blame, &c., which is imputable to the navigation of *both* ships, the owners of neither ship could recover at common law any compensation from the other. But in cases of this nature (which are of frequent occurrence, and whether or not such collision is the result of neglect, blame, &c. of both ships, can only be determined *with* the cause), the Court of Admiralty has a peculiar jurisdiction to decree that the owners of each vessel shall make good a moiety or proportion of the entire damage. "Where *both parties are to blame,* where there has been a want of due diligence or skill on *both sides,* in such a case the rule of law is, that the loss must be *apportioned between them*, as having been occasioned by the fault of both of them."†

damaged, and alleged to be consequential to the collision; but the Court appears to have refused to award such consequential damage, more by reason of the neglect of those in charge of the cargo, in not having protected it from the injury, than from want of jurisdiction.

* In matters of this nature, too, the Court of Admiralty has usually the assistance of Trinity masters; and points involving nautical skill are submitted to their opinion. For the Court's course of proceeding in taking the opinion of Trinity masters, see the *Vernon*, as reported in the No. Ca., vol. i. p. 280.

† *Per Cur.* the *Woodrop-sims*, 2 Dodson's Admiralty Reports, 85., and see Chitty's Practice of the Law, vol. ii. p. 515.

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ON THE JURISDICTION OF THE COURT OF ADMIRALTY IN CASES OF SALVAGE.

Definition of salvage.

SALVAGE is that compensation which is awarded to a person or persons by whom has been saved or rescued property from impending peril, or who has or have recovered it from actual loss. "This compensation," said Lord Tenterden, "at present, is commonly made by a payment in money, but in the infancy of commerce was more frequently made by the delivery of some portion of the specific articles saved or recovered."* Salvage has also been defined to be the term by which was implied the property which is actually so saved; but this definition is obsolete, and doubtless the old rule or manner of compensation was the origin of it; thus it is, too, that the proceedings in the Admiralty Court are in these cases against the property (*in rem*), although in some special cases, the proceedings are of necessity against the owner.† Salvage is of two kinds, viz. *civil* salvage, being such salvage as may become the subject of a demand in the Admiralty Court, on the civil side of its jurisdiction, for compensation for the rescue of property from loss by peril of the sea, and

* Abbott on Shipping, 554., 8th edit.; and see below, p. 186., as to the manner of remuneration under the laws of the Græco-Romans.

† On this point see the *Hope*, Horncastle, 3 Robinson's Admiralty Reports, 215., where an objection that civil proceedings on salvage could be instituted *in rem* only, and not against the owner, was overruled; see also p. 216., ibid. The *Trelawney*, *in notis*. The *Meg Merrilies*, 3 Haggard's Admiralty Reports, 346. But see more particularly on this point a dictum by Sir John Nicholl in the *Rapid*, p. 419. id.

military salvage *, or such as may become the subject of a demand in the Prize Court of Admiralty for the rescue of property from the hands of the enemy in the time of war. The nature of salvage as of war, and the jurisdiction of the Admiralty Court in that respect, will be discussed in another part of this treatise.

The Admiralty Court having the power to award compensation for injury or damage done to property at sea, so has it been entrusted with the power of awarding compensation for such benefit rendered to the property as is distinguished by the name of salvage service, and although the same principle applied originally to cases of salvage as of damage (namely, locality to determine the jurisdiction of the Admiralty Court), the nature of the service was always, and is still, a material point in determining the Admiralty jurisdiction; for it is not every benefit done to property at sea which is cognisable in the Admiralty Court.

The legislature of this country have wisely avoided laying down any positive and settled rule, as to what amount of compensation shall be made in cases of this nature; and the amount of salvage not having been fixed by any positive law, it is left to the equitable jurisdiction of the Admiralty Court to determine, by the principles of maritime law, what amount of compensation shall be given to the salvors, according to the various circumstances which attend each case. An enlarged discretion is exercised by the Admiralty Court in these cases, according to the different circumstances with which they are accompanied. "It is obvious," says Lord Tenterden, in his book on Shipping, "that positive and settled rules are little adapted to the administration of justice in varying and unsettled cases; and what can be more various and unsettled than the

* Called also salvage on recapture, hostile salvage, salvage of war, &c.

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degrees of labour experienced on the ocean, or the degrees of peril to which persons who engage in the meritorious task of assisting the distressed on that element are at different times exposed? And therefore in the case of wreck or derelict at sea, the law of *England*, like the law of some other countries, has fixed no positive rule or rate of salvage, but directs only as a general principle that a reasonable compensation shall be made." And the Court in fixing the amount of salvage necessarily looks, not only to the work and labour done by the salvors, but also to the risk and peril incurred, their skill, promptitude and alacrity, the value of the ship and cargo, and the degree of danger from which they were rescued.

The ingredients of a salvage service.

The principles on which the Court of Admiralty proceeds lead to a liberal remuneration in salvage cases, for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger if necessary, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most is, the actual danger which they have incurred; the value of human life is that which is, and ought to be, principally considered in the preservation of other men's property, and if this is shown to have been hazarded, it is most highly estimated.* According to the maritime law of the eastern division of the Roman empire, a rather singular distinction is made between the case of a person who had saved goods from the sea without risk or danger, and of his having actually incurred such risk

* By the Court in the *William Beckford*, 3 Robinson's Admiralty Reports, 355.

and danger; requiring him (the salvor), in the former case, to restore them to the previous owner on receiving remuneration or salvage; and allowing him, in the latter case, to appropriate them to his own use.*

The late Sir John Nicholl has defined the ingredients of a salvage service to be, *first*, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects. *Secondly*, the degree of danger and distress from which the property is rescued; whether it was in imminent peril and almost certainly lost, if not at the time rescued and preserved. *Thirdly*, the degree of labour and skill which the salvors incur and display, and the time occupied. *Lastly*, the value.

Salvors' title to remuneration not impaired by their leaving the ship.

By quitting the ship, the salvors do not impair their title to remuneration for services rendered, in the Admiralty Court. Lord Stowell said in the *Eleanora*, "It is an ill-founded and absurd notion, that unless salvors stick by the ship, they forfeit, or at least impair, their title to remuneration. It is very desirable that salvors generally should know that, in order to maintain their rights, it is perfectly unnecessary to remain on board the vessel which may have received their assistance." † Vide. E. R. 1 Ecc. Adm. Rep. 63.

* See Reddie's Historical View of the Law of Maritime Commerce, p. 124.

† The *Eleanora*, 1 Haggard's Admiralty Reports, 156. But by the common law of England, the salvor retains possession of the property saved, until a proper compensation be made to him; and on the proprietor tendering to the salvor such sum of money as he thinks fit, and on the salvor then refusing to deliver the goods, the proprietor may bring an action of detinue or trover against the salvor: then, if the jury think the tender sufficient, the proprietor will recover his goods. Lord Mansfield observed, in the case of *Le Cornu* against *Blackburn*, Douglas, 648., there is no *exaction* in a case of salvage; for no man may be compelled to pay salvage unless he chooses to have his property back.

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The locality of the service.

The locality in which the service was performed determined originally the jurisdiction of the Court of Admiralty. Such service must have been performed on the high seas,

It has been remarked that the locality in which the service was performed was that which originally determined the jurisdiction of the Admiralty Court, and unless the service, however meritorious, were performed on the high seas, the Admiralty had no jurisdiction: the inconveniences and occasional hardships with which the application of this rule was attended, called upon the legislature to increase the Admiralty jurisdiction in that respect. "In cases of wreck and derelict," said Lord Stowell, "I have known many instances of great hardship, and I will add of crying injustice, where salvors have been amused with negotiations till the goods were landed, and there the authority of this Court has been defied, and the just demands of the claimant laughed to scorn." *

or between high and low-water mark.

Questions having arisen as to the jurisdiction of the Admiralty Court in cases of salvage performed between high and low-water mark, it was enacted by the 31st sect. of the 1 & 2 Geo. 4. c. 75., that in such cases the Admiralty Court and the Courts of Record at Westminster should have concurrent jurisdiction; and this was the state of the law till the 3 & 4 Vict. c. 65. was passed; the service must have been rendered on the high seas, or within high and low-water mark to give the Admiralty jurisdiction, and where certain services in the way of salvage had been rendered within the body of a county, the salvor was left to an action at law; but by that statute it was enacted, that the Court of Admiralty should have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, or in the nature of towage, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered in respect of

Now that court has jurisdiction, without reference to locality, for services in the nature of salvage or of towage, ren-

* The *Two Friends*, 1 Robinson's Admiralty Reports, 283., and see also the *Eleanor*, 6 Robinson's Admiralty Reports, 39.

which such claim is made.* But according to the words used in that enactment, the property to which the salvage service was rendered within the body of a county must have been a "ship or sea-going vessel," to give the Admiralty jurisdiction; for where an application was made to the Court of Admiralty to decree a monition calling upon the owner of a certain raft of timber to show cause why a salvage remuneration should not be awarded for its rescue and preservation, it was held that as the locality where the alleged service was performed was clearly within the body of a county, the Court of Admiralty had no jurisdiction, the property saved being neither a ship nor a sea-going vessel.† However, by the more recent Salvage Act, the jurisdiction of the Admiralty in that respect is not confined to ships, but is extended to any kind of property saved.‡ Thus gradually was the Admiralty jurisdiction extended in this respect, and inconveniences and occasional hardships which attended the rule of locality were remedied and prevented.

dered to any ship or sea-going vessel. The service rendered must have been to a *ship or sea-going vessel*, to bring it within the statute; such service to a *raft of timber* was not so privileged;

but now extended to any kind of property saved.

In cases of this description which are brought before the Admiralty Court, it frequently happens that an agreement has been made between the master of the vessel in distress and the salvors. Such an agreement is no bar to the jurisdiction of the Admiralty Court: on the contrary, such agreements are frequently pronounced for, and not allowed to be set aside unless under strong and sufficient reasons; and where there is an agreement subsisting not cancelled by consent of parties, and where there are no circumstances such as neither party could reasonably be expected to foresee, and which consequently could not have been in their contemplation

Where an agreement has been made for the service, such agreement no bar to the jurisdiction of the Admiralty Court.

* See 3 & 4 Vict. c. 65. s. 6. in the Appendix.

† See the *Raft of Timber*, Steward, 2 W. Robinson's Admiralty Reports, 251.

‡ See Appendix.

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at the time the agreement was made, the agreement will be held binding in the Admiralty Court.*

The nature of the service.

Having thus dismissed the definition as to locality, there remains to be considered what must be the nature of the service to give the Admiralty Court jurisdiction. We have seen that by the new act, all demands whatsoever in the nature of towage are cognisable in that Court. Before this statute "in cases of towage, where there had been a contract between the parties, the Admiralty has no jurisdiction, it was, however, thought expedient by the legislature in all these matters, to give a remedy to the parties who might have rendered these services, whether on the high seas, or within the body of a county, by arresting a vessel, within the proper jurisdiction of this Court, and not to leave them to an action at law, as before the passing of this act."†

Cases of towage within the jurisdiction of the Court of Admiralty, whether or not there has been an agreement between the parties.

The nature of the property for which a claim of salvage is made, except with reference to statutes increasing the jurisdiction‡, will make no distinction as to the jurisdiction of the Admiralty Court; it is the nature of the service which is material; so that, for instance, in a question of mere transhipment of cargo, the Court of Admiralty would have no jurisdiction, unless indeed the cargo were in any degree of danger, and so as to require assistance to remove it into a place of safety; then it necessarily assumes the character of a salvage

No jurisdiction for mere transhipment of cargo.

* The *Mulgrave*, 2 Haggard's Admiralty Reports, 77. The *Betsey*, 2 W. Robinson's Admiralty Reports, 167. The *True Blue*, ibid., 176. See also the *Repulse*, 4 Notes of Cases, 141., which was a case of salvage where a written agreement had been entered into, to perform a certain specified service for a specified reward, such agreement not being alleged to be fraudulent, or to have been cancelled by mutual consent; the Court refused to interpret the agreement with reference to verbal contemporaneous conditions.

† *Per Cur.* in the *Ocean*, 4 Notes of Cases, 33.

‡ See above, p. 189., *The Raft of Timber*.

service, and the Court of Admiralty will adjudicate upon it as such.*

No jurisdiction for repairs effected to the vessel saved.

The Court of Admiralty cannot, in a case of salvage, allow charges for repairs which have been effected to the vessel saved. In the case of the *Ranger* †, a demand was made on the part of salvors for some temporary repairs effected to such vessel, and it was argued on their behalf, that that sum was so mixed up with the salvage that it could not be separated, and that they ought to be recovered together; but Lord Stowell held that the demand could not be recovered in the Admiralty Court, and decreed for the salvage service alone.

Salvage reward is for benefit actually conferred to the property;

Salvage reward is for benefit *actually conferred in the preservation of property*, not for meritorious exertions alone: however meritorious the exertions of alleged salvors may be, if they are not attended with benefit to the owners, they cannot be compensated in the Court of Admiralty‡; neither has that Court any jurisdiction or power to award compensation for saving the lives of individuals: but although the Court of Admiralty has not the power to remunerate the *mere* saving of life, (a subject which is always left to the bounty of the individuals,) if it can be connected with the preservation of property, whether by accident or not, then the Court of Admiralty can take notice of it, and is willing to join that to the *animus* displayed in the first instance.§

not for the mere saving of life;

There are several statutory enactments on this subject, but which, although they, for the most part, do not confer any additional power on the Admiralty Court in that respect, must here be brought to the notice of the reader.

* See the *Westminster*, 1 W. Robinson's Admiralty Rep. 229.

† 2 Haggard's Admiralty Reports, 42.

‡ *Per Cur.* in the *India*, 1 W. Robinson's Admiralty Rep. 40.

§ The *Aid*, 1 Haggard's Admiralty Reports, 83.

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Although by several statutes justices of the peace appear to have a power to award remuneration for saving of life, the Court of Admiralty has no such jurisdiction.

By a statute passed in the reign of George IV.*, by which powers were given to justices of the peace to decide certain salvage cases, it was enacted that the said justices might determine upon remuneration to be made for services rendered to ships in distress or otherwise, or *for being instrumental in saving the life or lives of any person or persons on board any ship.* In a recent cause of salvage† decided by the present learned Judge of the Admiralty Court, in which a claim was made for rescuing the master and crew, the vessel itself not having been saved, the above-mentioned enactment was referred to by counsel for the salvors in support of their claim; but it was held by the Court, *first*, that, upon general principles, a mere attempt to save the vessel and cargo, however meritorious that attempt may be, or whatever degree of risk or danger may have been incurred, if unsuccessful, can never be considered in the Admiralty Court as furnishing any title to a salvage reward. Salvage reward is for benefit actually conferred, not for a service attempted to be rendered.

Secondly, as to the successful rescue of the master and crew, who were on board the vessel at the time. The learned Judge was clearly of opinion that, according to general principles, and to the established practice of the Court of Admiralty, it had no authority to direct a salvage award upon the ground alone that the lives of persons on board a vessel in distress have been preserved by the successful exertions of the parties suing, the jurisdiction of the Court of Admiralty being founded upon a proceeding against property saved, and that there was no principle upon which owners could be made answerable for the mere saving of life. It was also held that the eighth section of the act of parliament referred to, conferred no new jurisdiction upon the

* 1 & 2 Geo. 4. c. 75. s. 8., repealed by the new salvage act.

† *Zephyrus*, 1 W. Robinson's Admiralty Reports, 329.

Court of Admiralty, referring, as it did, not to any power to be exercised by the Court of Admiralty; but was intended solely to give additional power to the magistrates at the outports to award salvage. "Whether," said the learned Judge, "it gives authority to the magistrates, or the commissioners of the Cinque Ports, to entertain questions of salvage under the circumstances of this case, it is unnecessary for me to determine. If it does confer on them this authority, it may incidentally, by way of appeal, confer upon this Court also a power to interfere. In the first instance, however, it is clear, in my judgment, that the act in question does not bestow any additional authority upon the Court, which the Court was not entitled to exercise before the passing of the act." *

By the new Wreck and Salvage Act †, repealing the statute above mentioned, it is enacted that every person who shall act, or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or *of the life of any person on board* the same, or of any wreck of the sea, or of any goods, jetsam, flotsam, lagan, or derelict, or of any anchors, cables, tackle, stores, or materials which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise, and whether such person shall have so acted at the request of, or on application by any person in authority, or by the master or owner of any ship or vessel, or otherwise, shall, within fourteen days after the service so performed, or within fourteen days after the owner or any other person shall have established his

* The *Queen Mab*, decided by Sir J. Nicholl, and reported in 3 Haggard's Admiralty Reports, 242., not a binding decision upon this point. See the remarks of Dr. Lushington at p. 333., 1st volume of W. Robinson's Admiralty Reports.

† 9 & 10 Vict. c. 99.

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claim to any such article as aforesaid, be paid a reasonable reward or compensation by way of salvage for such service by the commander, master, or other superior officer, mariners, or owners of the said ship or vessel, or their agent, or by the merchant whose ship, vessel, or cargo shall be so saved as aforesaid, or by the owner of the other articles herein-before mentioned, or other person claiming the same; and in default thereof, the said ship, or vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, shall remain in the custody of the High Court of Admiralty, and the said goods, or other article (and also, until warrant issued from the High Court of Admiralty, the said ship, vessel, or cargo), shall remain in the custody of the receiver or officer of the customs, until the person so acting or employed in the preservation of such ship or vessel, goods, or other articles as aforesaid, shall have been reasonably compensated for his said assistance and trouble, or reasonable security given for that purpose to the satisfaction of the said receiver, or officer of the customs, or High Court of Admiralty.

And by the twenty-first section it is enacted, that if any person shall have rendered any service (except ordinary pilotage) in the saving or preserving of any ship or vessel in distress, or of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, goods, or other article herein-before mentioned, which shall not become droits of Admiralty, and the said person, and the master or owner of such ship or vessel, or his agent, or the owner of such article, or his agent cannot agree upon the amount of salvage or compensation to be paid in respect of such service, then such person shall deliver to such master, owner, or agent, a statement in writing, without prejudice to either party, of the amount of salvage or compensation claimed for such services, and (unless such salvage shall

have been already paid by any receiver under the powers herein-before contained, or the claim thereto shall exceed the sum of two hundred pounds,) the matter or difference may be determined by any two justices of the peace residing at, or near to the place where such service has been rendered, within forty-eight hours after such difference shall be referred to them for their determination thereof; and, if they cannot agree respecting the same, then it shall be lawful for them to nominate any third person, conversant in maritime affairs, at their option, who shall ascertain the amount of salvage to be paid within forty-eight hours after he shall be so nominated as aforesaid; and the said justices and such third person so nominated as aforesaid, shall have full power and authority, whenever they see occasion, to examine the parties, or their witnesses, upon oath, to which oath they, or any one of them, are and is hereby authorised to administer. It is also provided, that when the salvage claim shall exceed the sum of two hundred pounds, then, and in every such case, the said matter or difference shall, in the event of no such disagreement being made as aforesaid, either by reference to arbitration or otherwise, be determined exclusively by the High Court of Admiralty.

Although, in these enactments, the words remuneration for preservation of life, &c., are frequently mentioned, no additional power appears to have been given to the Admiralty Court in that respect, and the decision in the *Zephyrus* will doubtless apply to this statute as to the former. The interpretation to be put on that clause would appear to be, not that the justices, &c., should be able to remunerate salvors for the *mere* saving of life, *i. e.* where not accompanied with the saving of property, but where property has been saved, that the exertions of salvors in saving the lives of the crew should not be lost sight of, at least in determining the

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animus with which the salvage had been affected; for, as was observed by the present learned Judge of the Admiralty Court, "in salvage cases the proceeding is against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the *mere* saving of life."*

The statute 1 & 2 Geo. 4. c. 75., now repealed, has been mentioned before; a power was thereby given to magistrates to decide salvage cases. The primary object of that statute was stated to have been to provide for small and occasional services, and, in such cases, to provide for the reduction of expenses; although, under the general words of the eighth clause, it was competent to the magistrates to proceed in cases of greater magnitude. In large cases the interest was sufficient to induce one party or the other to be dissatisfied with the award, and to appeal to the Court of Admiralty: there was thus the expense of two proceedings, amounting sometimes to nearly as much as the salvage. "It would be an improvement in the act," said the late Sir Christopher Robinson, "if the owners had the power of removing the case to the Admiralty Court in the first instance."†

* In a very clever article on this act in the Law Magazine, the following questions are asked with reference to this point: — "What is to be the statute measure of value of human lives, and who is to pay for the services of those who preserve them? Is everybody's life to be estimated at the same value, 'high and low, rich and poor, one with another?' or are we to return to the '*mund bryce*' and '*were gild*' of the Saxons? Above all, who is to pay? the owner of the life or the owner of the ship? * * * We apprehend that life-owners, ship-owners, and salvors will very seldom agree as to the value of the lives, and their worships, the two justices, or their referee (however conversant in maritime affairs), will find some difficulty in dealing with their life preservers."

† Another defect in that act was, that the Court of Admiralty had no power to enforce an *award* of salvage unappealed; and where salvors had obtained a salvage award from the magistrates,

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However, the statute of George IV. is repealed by the new Wreck and Salvage Act; and the power of justices of the peace, commissioners of salvage, &c., is confined to those cases in which the claim of salvage does not amount to 200*l.* It is also provided, that if any person claiming to be entitled to salvage, or the person against whom such claim is made, shall be dissatisfied with such award and decision, they may appeal to the High Court of Admiralty within ten days after the award shall have been made, and not afterwards. It is also provided, that in all cases which shall be so decided, the Court of Admiralty shall only have jurisdiction as a court of appeal, in accordance with the provisions of this act, or for the purpose of enforcing payment of the sum awarded. It is also provided, that where a sum of money has been paid for salvage service, either voluntarily, or in consequence of any agreement, or of any arbitration, or of any award made by justices, commissioners of salvage, &c., and such sum is distributable between two or more persons, in case of delay or injustice, &c., in distributing such sum, parties aggrieved may apply to the justices, commissioners, &c., who have full power to adjudge the due distribution of the sum if the share claimed be under 20*l.*; but if such share shall amount to 20*l.*, then the Court of Admiralty has jurisdiction to enforce and to adjudge the due distribution of such sum.*

The jurisdiction of the justices, &c., confined to cases in which the claim does not amount to 200*l.*

Appeal to the Court of Admiralty.

That Court has also the power of enforcing the payment of the sum awarded;

or the distribution of any sum awarded or agreed upon as salvage, where the share claimed be over 20*l.* Justices, &c., having the same power under 20*l.*

they had to originate a suit in the Admiralty. See the *Hector*, 3 Haggard's Admiralty Reports, 90. And the *Minerva*, *in notis*.

* Previous to this act, where a sum of money had been paid to the owners of a vessel for salvage services rendered, the claim for such services having been settled by arbitrators, it was held that the Court of Admiralty had no jurisdiction to decree a monition against such owner to bring in the money which had been transmitted to him on account of the vessel salving, and of which he has made no distribution. 1 W. Robinson's Admiralty Reports, 45. in note; and in the case of the *Hope*, 1 W. Robinson's Admiralty Reports, 265., it was held, under the provisions relating to

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By another (the fortieth) section of that statute, it is also enacted, that the High Court of Admiralty shall have jurisdiction to decide upon all claims and demands whatsoever in the nature of salvage for services performed, except in cases of goods directed to be sold as droits of Admiralty, whether in the case of ships or vessels, or of any goods or articles found, either at sea, or cast upon the shore, and whether such services shall have been performed upon the high seas, or within the body of any county.

Salvage to foreign ships.

For the jurisdiction of the Admiralty Court in cases of salvage services rendered to foreign vessels, the reader is referred to the cases of the *Two Friends* * and *Prinz Frederik* †: in the former case, Lord Stowell said, "I can see no inconvenience that would arise if a *British* court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature, respecting the merits of British seamen on such occasions; for salvage is a question of the *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of each country, to be applied, and construed, and explained by its own particular rules. There might be good reason, therefore, for this Court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim upon the general ground of *quantum meruit*, to be

salvage (now repealed) of the statute 3 & 4 Victoria, c. 65., that where an award had been made by magistrates in a cause of salvage, the parties in whose favour such award has been made cannot resort to the Court of Admiralty for a distribution, unless an application should have been made in the first instance to the magistrates for an order of distribution; and such application to the magistrates must be made either at the time when the award is made, or within fourteen days afterwards.

* 1 Robinson's Admiralty Reports, 271.

† 2 Dodson's Admiralty Reports, 451.

governed by a sound discretion, acting on general principles." The marginal note to this case is —"The Court of Admiralty will exercise a jurisdiction over a foreign ship rescued from the enemy, if there be any *British* subject concerned in the rescue who prays to be rewarded here." The latter case was a question as to whether a foreign ship of war, lying in a port of this country, is liable to the civil process of the Court of Admiralty, in a cause of salvage at the suit of British subjects. The provisions contained in the sixth section of the 3 & 4 Victoria, c. 65. render a further extension of this subject needless.*

The Court of Admiralty has no jurisdiction over the receivers of Admiralty droits under the act 9 & 10 Vict. c. 99. In the case of the *Tritonia* †, a receiver refused to relinquish possession until his charges were paid, but the Court of Admiralty could not interfere. In the *Aurora* ‡, complaint was made of the amount of the receiver's charges, but the Court said, "The act gives me no power to interfere." §

The Court of Admiralty has no jurisdiction over the receivers of droits.

* See Appendix A.

† 5 Notes of Cases, 110.

‡ Ibid. 111., in note.

§ For remuneration by way of salvage for defending a ship against pirates. See post, p. 204.

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OF THE JURISDICTION OF THE ADMIRALTY COURT OVER DROITS OF ADMIRALTY, AND OTHER SUBJECTS NOT NOTICED IN THE PREVIOUS PART OF THIS TREATISE.

THE jurisdiction of the Court of Admiralty over property which has been abandoned, and respecting which no claim for salvage is made, must now be considered; for of those goods, which upon being abandoned by the owners, become "droits of Admiralty," that Court has jurisdiction.

By the general law, all goods found afloat and derelict on the high seas, belong as droits to the Crown, in its office of Admiralty; and the usual proceeding in the Admiralty Court is by his Majesty's proctor in his office of Admiralty, against the property alleged to have been found derelict, in order to have them condemned as droits, in case no owner should appear within the time prescribed by law. Owners are, by the present law, allowed twelve months from the day on which the article shall have been saved or reported to the receivers to make good their claim to it.* If not legally claimed by the owners within twelve months, any lord of a manor, grantee of the Crown, &c., having given notice, is allowed one month to make good his right.† And if within the said periods no claim shall be established either by owner, lord of the manor, &c., the articles shall be deemed droits of the Admiralty without any process whatever.‡ But the Court of Admiralty has no jurisdiction of wreck of the sea, for that must be cast

Of *wreck of the sea* the Admiralty Court has

* Sec. 9. the new Wreck and Salvage Act.

† Sec. 10. id. ‡ Sec. 11. id.

upon land before it becomes wreck; but of flotsam, jetsam and lagan, it has jurisdiction, as they are in and upon the sea; and between high and low-water mark the Court of Admiralty and the courts of common law have jurisdiction by turns; the jurisdiction of the Admiralty Court subsisting whilst the shore is covered with water, the jurisdiction of the common law when the land is left dry.*

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no jurisdiction, but has of flotsam, jetsam, and lagan Of things found between high and low-water mark, the Admiralty and common law have concurrent jurisdiction.

In the celebrated case reported in the third volume of Dr. Haggard's Admiralty Reports, of the *King* v. *Forty-nine casks of brandy*, the casks of brandy were divided into eight separate classes: CLASS 1. Six casks picked up beyond the utmost limits contended for; these were not included in the claim of the lord of the manor as *wreccum maris*, and were condemned in the Admiralty Court as droits to the king in his office of Admiralty.

CLASS 2. Thirty-eight casks picked up outside of low-water mark, but within three miles of the shore, also condemned.

CLASSES 3 and 4. Between high and low-water mark, condemned.

CLASS 5. Three casks found aground between high and low-water mark, held to be wreck of the sea.

CLASS 6. Five casks having taken the ground between high and low-water mark, though still moved by

* "But this, 'coming to land,' is about as difficult a matter to accomplish legally as it is physically; for the tide with its ceaseless ebb and flow, turning land into water, and water into land, and the surf and breakers only permitting an occasional 'landing,' in the shape of a 'thump' or a crash, and then, perhaps, bearing off their burden *in gremio*, as if in sport, the legal character of the goods is continually changing. To settle the legal boundaries of sea and land, to say judicially to the sea, 'hitherto shalt thou come, and no further,' to determine what was such a 'landing' as would constitute 'wreck' cost no small legal 'work and labour.'"—From an article in the Law Magazine, on the "Wreck and Salvage Act."

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the waves, the sea, at one time surrounding them, and at another leaving them dry, were considered, probably, as not on the high sea, but as wreck of the sea: they had, it would seem, actually struck the ground, and though bumped about by the waves, it seldom happens that the shore is without some portion of water upon its surface, or amongst the crevices of rocks. It was, however, considered doubtful, according to the affidavits, whether these five casks were more in the land, than the sea jurisdiction; and it was suggested by the Court, that under such circumstances, the Crown probably would not press for a construction unfavourable to the lord of the manor.

CLASS 7. Referred to one cask afloat, and though the land underneath was dry at low water, even in neap tides, yet in this *divisum imperium* the Admiralty was held to have the benefit of its jurisdiction at the time the cask was taken possession of.

CLASS 8. Had the benefit of being taken when aground, and held to belong to the lord of the manor.

Thus forty of these casks were, after much argument and laborious investigation, held to be within the jurisdiction of the Admiralty Court, and nine were allowed to the claimant as "wreck of the sea."

In the case of the *King* v. 2 *Casks of Tallow* *, it was held that things floating, though between high and low-water mark, not having touched the ground, cannot be *wreccum maris;* if fixed to the land between high and low-water mark, though with water round them, they are *wreccum maris.* If, after having once touched the land, between high and low-water mark, they are again afloat, they are not necessarily *wreccum maris,* but their legal character will depend on the particular circumstances.

* 3 Haggard's Admiralty Reports, 294.

These droits are not condemned to the Crown "jure coronæ," but to his Majesty in his office of Admiralty *; they were originally certain perquisites which belonged to the Lord High Admiral, and in the early patents, among other perquisites granted to that ancient office, these were enumerated under the terms "derelicts, wrecks, flotsam, jetsam, and ligan." In the first year of Queen Anne, a deed of surrender was executed by the lord admiral (then Prince George of Denmark) surrendering to the queen all the profits and perquisites of the office (except 2500*l.* a year to be disposed of for such particular uses as her Majesty should direct) for the public use during war, as her Majesty should also direct. This appears to have been the first time that these perquisites were in any manner severed from the office where there was a lord admiral, and the severance led to the first prize act. Since that arrangement the office has been in commission (except for the short period when King William IV., then Duke of Clarence, was appointed to it in the reign of George IV.). In all subsequent patents and commissions the droits have been reserved to the king, and are now considered as commuted and transferred to the public.†

These droits are condemned to "her Majesty in her office of Admiralty," and not "jure coronæ."

Among the other perquisites which originally attached to this office, was the important one of all goods and chattels of pirates. It is necessary, as has been observed in a previous part of this work, that there should be a previous conviction of piracy before the title of the admiral (or the Crown in right of Admiralty) can attach, although for a suit *civiliter* for restitution of goods piratically taken, it is not so. There must be a judicial

The goods of pirates. There must be a previous conviction of piracy before the title of the admiral attaches.

* By 1 William 4. c. 25. all Admiralty droits are carried to, and made part of the consolidated fund; but by s. 12. the Crown retains the power of granting out of them a reward to seizors or informers relating thereto.

† See 3 Haggard's Admiralty Reports, 281.

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declaration, said the present learned Judge of the Admiralty, before the right of the admiral can attach. In the recent case of the *Panda**, it was decided that goods taken out of the possession of pirates, although not proved to be the *actual property* of pirates, but still not shown to be the property of others by proof or reasonable presumption, belonged to the Crown as droits of Admiralty and not to her Majesty *jure coronæ*.

Remuneration for defending a ship against pirates, &c., recoverable by process of the Admiralty Court.

It has been enacted †, "that when any *English* ship shall have been defended against any pirates, enemies, or sea rovers by fight, and brought to her destined port, in which fight any of the officers or seamen shall have been killed or wounded, it shall and may be lawful to and for the judge of his Majesty's High Court of Admiralty, or his surrogate in the port of London, or the mayor, bailiff, or chief officer in the several outports of this kingdom, upon the petition of the master or seamen of such ship so defended as aforesaid, to call unto him four or more good and substantial merchants, and such as are no adventurers or owners of the ship or goods so defended, and have no manner of interest therein, and by advice with them to raise and levy upon the respective adventurers and owners of the ship and goods so defended, by process out of the said Court, such sum or sums of money as himself and the said merchants by plurality of voices, shall determine and judge reasonable, not exceeding two pounds *per centum* of the freight, and of the ship and goods so defended according to the first cost of the goods; which sum or sums of money so raised shall be distributed among the captain, master, officers, and seamen of the said ship, or widows and children of the slain, according to the direction of the judge of the said Court, or his surrogate in the port of London, or the mayor, bailiff,

* 1 W. Robinson's Admiralty Reports, 423.

† 11 & 12 Wm. 3. c. 7. s. 11. See also 22 & 23 Car. 2. c. 11. s. 10.

or chief officer in the several outports of this kingdom with the approbation of the merchants aforesaid, who shall proportion the same, according to their best judgment, unto the ship's company as aforesaid, having special regard unto the widows and children of such as shall have been slain in that service, and such as have been wounded or maimed.

Any ship trading, &c. with pirates, to be condemned in the Court of Admiralty.

It has also been enacted* that every ship or vessel which shall be fitted out with a design to trade with, or supply or correspond with any pirate, and all and every goods and merchandise put on board the same for any intent or purpose to trade with any pirate, felon, or robber on the seas, shall be *ipso facto* forfeited; one moiety thereof to the use of the King's Majesty, his heirs and successors, the other moiety to the person or persons who shall first make discovery, and give information of such intent or design; and such person or persons who shall first make such discovery shall and may sue for and recover the said ship or vessel, and all and every the goods and merchandises on board the same, and in the High Court of Admiralty.

Bounty or head-money on capture of piratical ships.

By another act† for encouraging the capture or destruction of piratical ships, it is enacted that there shall be paid by the treasurer of the navy, on bills made forth by commissioners, 20*l.* for every piratical person secured or killed during the attack on any piratical vessel, and 5*l.* for every man not taken or killed; the numbers of such piratical men respectively to be proved by the ship's papers taken on board such piratical ship, vessel, or boat, verified by the oaths of two or more of the persons who shall have found and taken possession of such papers, or by such other evidence as under the circumstances of the case shall by the Judge of the High Court of Admiralty, or by the judge of

* 8 Geo. 1. c. 24.

† 6 Geo. 4. c. 59.

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any other court authorised to take cognisance of such matter, be deemed sufficient proof thereof.*

Salvage on recapture from pirates.

It is also enacted by the same statute that if any ship, vessel, goods, &c., found and taken in the possession of pirates, shall be duly proved in and adjudged by Court of Admiralty, or other court having competent jurisdiction therein, to have belonged to and to have been taken from any of his Majesty's subjects, then such ship, &c. so proved shall, by the decree of the said Court, be adjudged to be restored, and shall be accordingly restored to the former owner or owners, proprietor or proprietors thereof respectively, he or they paying for, or in lieu of salvage, a sum of money equal to one-eighth part of the true value of such ship, &c., which money shall be paid to, and divided and distributed amongst such persons, and in such manner, form, and proportion as shall, by any proclamation or order of his Majesty in council, be directed for the distribution of the produce of any ship, &c., or other property of pirates.

Offence for wearing illegal colours; penalty may be recovered in the Admiralty Court.

An offence over which the High Court of Admiralty has jurisdiction, and which is still punishable in that court, is the wearing illegal colours †, namely, for merchantmen or privateers wearing his Majesty's flag, commonly called the Union Jack, or any shape or mixture of colours so nearly approaching to it as not to be easily distinguished. A proclamation issued 1st Jan. 1801, declaring what ensigns or colours shall be borne at sea in merchant ships or vessels belonging to any of his

* See the *Serhassan Pirates*, 2 W. Robinson's Admiralty Reports. *Piratical vessel*, name unknown. 2 Notes of Cases, 9.

† See the case of the *Minerva*, 3 Robinson's Admiralty Reports, 34., and note to that case. In one of his charges to the Admiralty Sessions, Sir L. Jenkins mentions this as an offence under the laws of the sea, and ancient constitutions of Admiralty. — *Life of Sir L. Jenkins*, vol. i. p. 97.

Majesty's subjects of the United Kingdom, &c.* By an act passed in the sixth year of Geo. IV. for the prevention of smuggling, it was enacted that no person should carry or hoist flags in or on board any ship, &c., in imitation of those used in his Majesty's navy, under a penalty of 50*l.* and costs, to be recovered in the High Court of Admiralty of England, or in any of his Majesty's Courts of King's Bench at Westminster, &c.; but this has been re-enacted by a statute passed in the fourth year of his late Majesty †, in the following words:— "That from and after the passing of this act it shall not be lawful for any of his Majesty's subjects whomsoever to hoist, carry, or wear in or on board any ship, vessel, or fishing-boat, or any other vessel or boat whatever, whether merchant or otherwise, belonging to any of his Majesty's subjects, his Majesty's jack, commonly called the Union Jack, or any pendant or any such colours as are usually worn by his Majesty's ships, or any flag, jack, pendant, or colours whatever, made in imitation of or resembling those of his Majesty, or any kind of pendant whatsoever, or any ensign or colours whatever other than those prescribed by the said proclamation; and that if any person or persons shall, nevertheless, presume to hoist, carry, or wear in or on board any ship or vessel, fishing-boat, or other vessel or boat whatever belonging to any of his Majesty's subjects, whether the same be merchant or otherwise, his Majesty's jack, commonly called the Union Jack, or any pendant or colours such as are commonly worn by his Majesty's ships, or any jack, flag, pendant, or colours whatever, made in imitation of or resembling those of his Majesty, or any kind of pen-

* Gazette of 3rd Jan., 1801, and see the note mentioned above, in 3 Robinson, and also Appendix, No. 2. to that volume, containing the particular directions.

† 4 Will. 4. c. 13. s. 11.

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dant whatever, without such warrant as aforesaid; or any other ensign or colours than the ensign or colours prescribed by the said proclamation to be worn, then and in every such case, the master or other person having charge of such ship, vessel, or boat, or the owner or owners thereof being on board the same, and every other person so offending shall, for every such offence, forfeit and pay a sum not exceeding 500*l.*, to be recovered with costs of suit, either in the High Court of Admiralty of England, or in any Vice-Admiralty Court in his Majesty's colonies, or in any of his Majesty's Courts of King's Bench or Exchequer at Westminster or Dublin, at the suit of his Majesty's Attorney General, or in the Courts of Session or Exchequer in Scotland respectively; and that it shall be lawful for any officer of his Majesty's navy, or marines belonging to any of his Majesty's ships, or any officer of the customs or excise, to enter on board any ship, vessel, or boat so hoisting, wearing, or carrying any jack, flag, ensign, pendant, or colours prohibited by the said proclamation, and by this act to be hoisted, worn, or carried, and to seize and take away the same, and the same shall thereupon become forfeited."

The proceeding in such cases is by *warrant of arrest* against the commander of the ship; then by *articles;* and on proof of which by *monition*, directing the offender to pay the penalty.

The proceedings in the Court of Admiralty are in such cases by warrant of arrest against the commander of the vessel, and then by articles on behalf of the king in his office of Admiralty, alleging the offence; on the defendant being condemned in the penalty and in costs, a monition will issue directing him to pay the penalty to the king in his office of Admiralty.* On the 4th November, 1829, a warrant of arrest issued against the master of a merchant schooner, for contempt in passing one of the king's ships in Cork harbour, without striking

* See the *Minerva*, and the *King* v. *Benson*, 3 Haggard's Admiralty Reports, 96.

or lowering her royal, being the uppermost sail she was then carrying.*

The Court of Admiralty was formerly a Court of Revenue in one of its branches, *i. e.* by means of its appellate jurisdiction from the decrees of the Vice Admiralty Court; but such jurisdiction is now removed to a higher tribunal as will be presently seen.

The Court of Admiralty no longer a court of revenue; the appellate jurisdiction from the Vice Admiralty Courts being removed.

By an act to regulate the practice and fees in the Vice Admiralty Courts abroad†, it is enacted, that in all cases in which proceedings may be had in any of the said Vice Admiralty Courts, if any person shall feel himself aggrieved by the charges made by any of the officers or practitioners therein, and the allowance thereof by such Vice Admiralty Court, by reason that such charges are not warranted by the tables mentioned in that statute, it shall be lawful for such person or his agent, under the regulations to be established in pursuance of the powers given by summary application to the High Court of Admiralty, to have the said charges taxed by the authority thereof.

The charges, &c., in the Vice Admiralty Courts may be taxed in the Court of Admiralty.

By a subsequent act‡ for the better administration of justice in her Majesty's Privy Council, it is enacted, that all appeals or applications, as well in prize suits, as in all other suits or proceedings in the Courts of Admiralty or Vice Admiralty Courts, or any other Court in the plantations in America, and other his Majesty's dominions, or elsewhere abroad, which may now, by virtue of any law, statute, commission, or usage, be made to the High Court of Admiralty in England, or to the Lords Commissioners in prize cases, shall be made to his Majesty in council, and not to the said High Court

The appellate jurisdiction removed to the Privy Council.

* The *Native*, Haggard's Admiralty Reports, vol. iii. p. 97., in note.

† 2 Will. 4. c. 51.

‡ 3 & 4 Will. 4. c. 41.

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of Admiralty in England, or to such commissioners as aforesaid; and such appeals shall be made in the same manner and form, and within such time wherein such appeals might, if this act had not been passed, have been made to the said High Court of Admiralty or to the Lords Commissioners in prize cases respectively; and that all laws or statutes now in force, with respect to any such appeals or applications, shall apply to any appeals to be made in pursuance of this act, to his Majesty in council.

Condemnations of vessels engaged in the slave trade.

It is by reason of its appellate jurisdiction being removed, that the Court of Admiralty is at the present time but seldom called upon in questions relating to the condemnation of vessels engaged in the slave trade. And again, this jurisdiction has in a great measure been removed from the Vice Admiralty Courts, by several treaties concluded between England and several foreign states, to Courts acting under commissions from the different governments, and called Mixed Commission Courts *, who are to judge definitively and without appeal; and all cases of foreign vessels seized as engaged in the slave trade are to be condemned in one of those Courts. By these treaties it is expressly provided, that search and capture shall only be made by vessels specially authorised and appointed for the purpose, and thus it is left entirely to the Mixed Commission Courts to decide whether or not a capture was made duly or not, and whether by a vessel duly entitled; and to this point their sentence is conclusive, and not open to further investigation in the Courts of this country. But the High Court of Admiralty has the power of enforcing their decrees, and also to hear any question of joint-capture. Any party or parties claiming any benefit by way of bounty or share of the proceeds for

The Mixed Commission Courts;

their sentence final.

Court of Admiralty can enforce the decrees of those courts, and hear any question of joint capture,

* See 5 Geo. IV. c. 113.

seizure of any foreign vessel engaged in this trade contrary to the treaty or convention, also may resort to the High Court of Admiralty for obtaining the judgment of the Admiralty Court in that behalf.* Although in the commission or patent of the Judge of the High Court of Admiralty, he appears to have been always authorised to take cognizance of causes of charter-party, and although, in the agreement at Whitehall †, these causes were left to the jurisdiction of that Court, still this is one of the many powers of that commission which by the construction of the superior Courts has been rendered nugatory; and it would appear that the Court of Admiralty can in no manner entertain an action for the breach or faithful performance of such an instrument. "A charter-party, made by the master in his own name, furnishes no direct action against the owners grounded upon the instrument itself by the law of *England;* but when this contract is made by the master in a foreign port, in the usual course of the ship's employment, and under circumstances which do not afford evidence of fraud, or when it is made by him at the ship's home under circumstances which afford evidence of the assent of the owners, the ship and freight, and therefore, indirectly, the owners also, to the amount of the value of the ship and freight, are *by the marine law*

or decide any question of bounty.

The Court of Admiralty has no jurisdiction in cases of charter-party; notwithstanding the terms of patent of the judge, or of the agreement at Whitehall,

and the *general maritime law.*

* See the case of the *Eagle*, 1 W. Robinson's Admiralty Reports, 236. in which it was decided that the Court of Admiralty was not excluded by a sentence of the Mixed Commission Court from considering the question of to whom the bounties or the proceeds arising from the condemnation belong, nor is it precluded from deciding upon questions of joint capture after sentence given by that Court, the only object of the treaties being, that the Mixed Commission Courts have to determine the rights of the subjects of the two contracting states, when they are put in competition with each other; all matters of municipal regulation, such as who is entitled to bounty to be paid out of the revenue, being still left to the Admiralty Court.

† See above, p. 23.

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bound to the performance.* "*The ship is bound to the merchandize, and the merchandize to the ship,*" are the words of *Cleirac.*† By the *French* ordinance ‡ it is declared, that the ship, with its furniture and freight, and the cargo, are respectively bound to the stipulations of the charter-party. And *Valin,* in his commentary, says the rule is the same whether the affreightment be made by the owner, or the master alone, even at the place of the owner's abode, if the owner does not disavow it."

"By the *French* ordinance §, the master is bound to follow the advice of the owners when he freights the ship at the place of their abode. The ordinance of the *Hanse-towns,* art. 58., is to the same effect. *Valin,* in his commentary on the *French* ordinance, restrains the necessity of this consent of the owners to the presence of all or the greater part of the owners, or of one appointed to act for all; and says, that if in such a case the master make a contract without their consent, the owners may annul it, and make another by their own authority. But the master himself will be answerable for the non-performance of it. This doctrine is also adopted by his countryman *Pothier.*"‖

"It is true, indeed, that this principle of the maritime law, by which the ship itself, in specie, is considered as a security to the merchant who lades goods on board of it, cannot be carried into effect in this country, because the Court of Admiralty, in which

* An instance of a sentence in Spain against master and ship for barratry and deviation by the master, who had let the ship by a charter-party, is mentioned in an anonymous case, in 2 Ch. Ca. 238.

† *Les Us et Coutumes de la Mer,* p. 72.

‡ French ordinance, liv. 3. tit. 1. *Des Chartes-parties,* art. 11., and see liv. 1. tit. 14. *De la Saisie des Vaisseaux,* art. 16.

§ Liv. 3. tit. 1. *des Chartes-parties,* art. 2.

‖ *Pothier, Charte-partie,* No. 48.

alone proceedings can be carried on against the ship, has no jurisdiction in such a case. But I apprehend the owners may be made responsible, either by a special action on the case at the common law, or by a suit in equity, for the faithful performance of the stipulations of a charter-party made by the master under the circumstances before mentioned."*

* Abbott's Shipping, pt. ii. ch. 2.

CHAP. IX.

ON THE JURISDICTION OF THE PRIZE COURT OF ADMIRALTY.

In the former part of this treatise, relating to the Instance Court of Admiralty, it has been seen how rudely has the rule of locality which formerly prevailed as a limit to the jurisdiction of that Court, been disturbed, and in some instances destroyed. But as regards the *Prize* Court of Admiralty, to which our attention is now called, the rule of locality never prevailed; the nature of the question, the subject matter to be adjudicated upon, excluding the rule of locality. None of that jealousy which has been frequently the subject of remark in the preceding pages, as formerly existing between the superior Courts of Westminster and the Maritime Court of Doctors' Commons, was ever directed against the prize jurisdiction of the latter Court. The reason of this is obvious; namely, that the Courts of common law, being totally unable to try the question of *prize*, never attempted to confine the jurisdiction of the Admiralty Prize Court to the "high seas," nor to control it by any principle of locality. Totally unable, for first, they had no delegation from the king, "the fountain of prize," for such purpose; and secondly, from the very nature of their jurisdiction, they could not embrace adequately such questions, which depend upon the law of nations. No other Court, then, having jurisdiction over the subject matter, it is not very extraordinary that the Prize Court was never interfered with, and a further extension of this subject would be useless.

The rule of locality never prevailed in the Prize Court.

"In matters of prize, the rule which the civilians so

much, so justly, but so unsuccessfully, laboured to establish in the Instance Court, is universally confessed and admitted." *

Definition of prize.

Prize is the property of an enemy, taken in time of war; one of the elementary principles of prize law is, that all prize belongs to the state; in monarchies, to the sovereign.† The king is the "fountain of all prize," and by the law and constitution of England the sovereign alone has the power of declaring war and peace; for it is held by all writers on the law of nature and nations, "that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power." ‡ This right is given up by the entire body of the people to the sovereign; he alone has the power of removing the state of war in whole or in part, as by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. §

The king the "fountain of prize." In him alone the right of making war and peace.

The king's licence.

But, although the sovereign is the fountain of all prize, it has been for a long time a part of the policy

* Browne's View of Admiralty Law.

† *Melomane*, 5 Robinson's Admiralty Reports, 48.

‡ Puff, b. 8. c. 6. s. 8. Barbeyr. Blackstone.

§ The *Hoop*, 1 Robinson's Admiralty Reports, 199. Hence, it being an established maxim, that no subject of this country can trade with the enemy, such trade being illegal by the general maritime law of the kingdom, independent of acts of parliament, the king's licence is requisite for that object. 1 Robinson's Admiralty Reports, 250., and *Hoffnung*, 2 Robinson's Admiralty Reports, 166. "No principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state." *Per Cur.* 1 Robinson's Admiralty Reports, 200., and *Angelique*, 3 Robinson's Admiralty Reports, Appendix, it being "in the power of the Crown alone to declare war, so it rests with that authority, only, to dispense with its operations." Cases of nonconformity with the privileges and instructions contained in the king's licence, and condemnation in consequence, are frequent in the Admiralty Court.

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The interest in "prize," granted to whom;

of government to part with that interest, and the benefit of prize has been granted out to persons of certain descriptions, how, to whom, and in what manner, we will now consider. A very ancient grant has given to the Lord High Admiral the benefit of all goods, &c., taken as prize by *persons not commissioned.** The other grants from the Crown have been made by the Proclamations and Prize Acts, conferring the interest in prize on ships of war, on mariners on board such ships, on such armed ships as are hired in the public service, and also on those ships to whom have been granted certain public commissions called letters of marque.

The whole subject matter of prize, then, is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown: "No man has, or can have, any interest in it," said Lord Stowell, "but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown; the acquisitions of war belong to the Crown; and the disposal of these acquisitions may be of the utmost importance for the purpose both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *bello parta cedunt reipub-*

* For, although it may be, according to the law of nations, lawful for any subject to seize upon the goods and ships of enemies in time of war, still, they can have no title or claim to appropriate to themselves the ships or goods of the enemy so taken; they belong to the Crown as droits of Admiralty. It lies on the individual captor, in every case, to show the authority by which he is entitled to take for his own benefit. "The title deeds," said Lord Stowell, "on which only, claims of this kind can be constructed, are the Prize Act and the Proclamation." All title to sea-prize must be derived from commissions under the Admiralty.

licæ. It is not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war may use it in the most beneficial manner, for the purposes of both. A general presumption arising from these considerations is, that government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed." * Captors have, by the different grants from the Crown, a general right to seize; but with this right a duty has always been enjoined, an obligation has always been imposed on the captor to proceed to adjudication. "Captors have generally a right to seize, subject to this duty of bringing to adjudication; a duty enjoined, that they may not make seizures without bringing the ships and goods seized to the notice of the proper tribunal, in order to prevent the right of seizure from degenerating into piratical rapine." †

subject to adjudication.

So that although captors have a right to seize, no beneficial interest attaches until after adjudication. It was judicially determined by Lord Stowell in the *Elsebe* ‡, that the Crown has, in all prize grants, reserved to itself the right of controlling the whole proceeding till final adjudication. In the case of captures made by the king's own ships, the authority of the Crown is most marked upon the face and in the substance of every part of the proceedings in the most emphatical manner. The Crown officers are the prosecutors in the name of

And until after adjudication no beneficial interest attaches.

* The *Elsebe*, 5 Robinson's Admiralty Reports.

† *Per* Lord Stowell, 5 Robinson's Admiralty Reports, 185., and before proceedings of condemnation have been taken or commenced, the Court of Admiralty will refuse the aid of its jurisdiction. See post, p. 248, 249.

‡ 5 Robinson's Admiralty Reports, 173.

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the Crown; in seizures made by private ships of war, the hand of the sovereign authority is less visible in the mode and style of proceeding, but the right of the Crown is sufficiently guarded by the repeated declarations, that the interest shall vest in such captors "*after final adjudication,*" *and not before.**

Having thus seen to whom, and subject to what limits, principally, namely, subject to the duty enjoined therein, that they must proceed to adjudication, the Crown has granted the *interest* in prize, the following question naturally suggests itself: — Upon what tribunal has the *authority* of adjudicating these questions been devolved? *From time immemorial* the adjudication of these questions has devolved upon the High Court of Admiralty. How, or in what manner these ques-

Such adjudication devolved on the High Court of Admiralty.

* The practice of the Crown to direct the release of ships before final adjudication is *unquestioned.*

Lord Stowell said, in the *Elsebe*, "I cannot but think that an expression which is reported to have fallen from Lord Mansfield in a case (*Lecras* v. *Hughes*) relating to the insurable interest of captors, namely, '*that the Crown does not interfere*,' must have been founded in some error of the *fact.* Such instances will appear less numerous, because the fact that they have been so released is not necessarily, nor very distinctly entered in the books. All that appears is, that the proctor, then proceeding for the Crown, as he must do, declares that he proceeds no further, on which the Court issues an order of restitution, as a matter of course, and of necessity; for what party can interpose and pray a condemnation to the Crown, when the Crown has declared that it prays no such thing, but consents to the restitution? I take this, therefore, to be the first case in which the effect of such a consent on the part of the Crown has been called in question. * * * * * * When it is alleged that all former cases have passed by consent, the fact itself, that the power was not questioned in those cases, affords a strong proof that the power was considered as *unquestionable*, and I must add, that though I have suffered a party to stand before the Court for the purpose of arguing the question, I do not know the party who can legally stand before it, praying a condemnation to the Crown, which the Crown itself publicly renounces." As to a *dictum* by Lord Kenyon in the argument upon the *St. Jago*, upon this point, see vol. v., Rob., p. 189.

tions were *first* put out of the hands of the sovereign appears to be still a mystery, which the insufficiency of authentic records has failed to elucidate.*

* As the authority of the Admiralty Court in these matters has been always so unquestionable, no other tribunal except as aftermentioned having so much as hinted at a jurisdiction over the subject matter, the point, as to whether this power was first executed by the Admiral's Court, without any *special* commission from the Crown, or whether such commission was necessary to constitute or call it forth, is a point likely to be as uninteresting and useless to the reader, as it would be a thankless, if not fruitless task to the writer; but, as some ink has been already spilt on the subject, and a claim was very strongly urged by the Admiralty Court in Ireland, where it was insisted that the ordinary commission included prize (see Browne's View of the Civil Law, vol. ii. p. 212.), it is enough to mention that though the Court of Admiralty of England may have, in some instances, exercised a prize jurisdiction without any special or direct commission from the Crown, some authority from the Crown, some commission must have previously issued for that purpose, or that Court could never have tried the question. The learned Dr. Browne has argued, in his work on the Admiralty Jurisdiction, that as no prize commission had issued, as far as appears in ancient times, the authority of the Admiralty of England must be considered *as inherent*. The fallacy of such an argument is evident from the nature of the interest of the Crown in the subject of prize; it is clear that a commission of some sort is necessary for any Court to entertain such a question; it is also clear that the authority, whether by special commission or otherwise, which has been granted to the Admiralty Court, has been, from time immemorial, sufficient to embrace the whole question of prize, and that to no other Court has a commission sufficient for that purpose being granted. The only manner in which the prize jurisdiction of the Court of Admiralty can be considered to be *inherent*, would appear to the writer of these pages, to be this: — that though the Court of Admiralty had originally received a commission from the Crown to try the question of prize, it was thought proper that that Court so *constituted*, should occasionally, as for instance, on the special occasion of a war, receive special commissions from the Crown to *call forth* its jurisdiction; and this is the signification which appears due to the expressions, "constitute" and "call forth," made use of by Lord Mansfield, so strongly objected to by Dr. Browne, as ambiguous and unsatisfactory; but they are no more ambiguous than the obscurity, in which the constitution of the prize branch of the Admiralty jurisdiction is involved, demands;

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The antiquity of this power of the Admiralty Court.

In the earlier ages of our naval history, the whole interest of prize was, doubtless, not so considerable as to require great specification. The law of nations had received but little attention*, and how this booty was

and the further remark by Lord Mansfield, also objected to by the learned commentator, that, "since Queen Elizabeth's reign, the Judge of the Admiralty, either by an inherent power, or by the king's commission, *or* both, has solely exercised prize jurisdiction," is peculiarly correct, for that great lawyer never intended this expression to convey the doubtful meaning which has been applied to it in this instance: this is the more evident from a material point in Lord Mansfield's dicta having been omitted, seemingly *ex industria*. The remark of Lord Mansfield, as reported in Douglas, is:—"Since the reign of Queen *Elizabeth no special commission appears to have issued;* but the Judge of the Admiralty, either by virtue of an inherent power, or the king's commission, or both, has solely exercised the jurisdiction of prize." The expression inherent, made use of by his Lordship, can only mean an inherent power by previous grant from the Crown, "the fountain of prize."

* "The law of nations, strictly so called, was in a great measure unknown to antiquity, and is the slow growth of modern times, under the combined influence of christianity and commerce.[1] It is well known, that when the Roman empire was destroyed, the christian world was divided into many independent sovereignties, acknowledging no common head, and connected by no uniform civil polity. The invasions of the barbarians of the north, the establishment of the feudal system in the middle ages, and the military spirit and enterprise cherished by the crusades, struck down all regular commerce, and surrendered all private rights and contracts to mere despotic power. It was not until the revival of commerce on the shores of the Mediterranean, and the revival of letters, and the study of the civil law by the discovery of the Pandects, had given an increased enterprise to maritime navigation and a consequent importance to maritime contracts, that anything like a system of international justice began to be developed. It first assumed the modest form of commercial usages; it was next promulgated under the more imposing authority of royal ordinances; and it finally became, by silent adoption, a generally connected system, founded in the natural convenience, and asserted by the general comity of the commercial nations of Europe. The

[1] See 1 Ward, Law of Nations, ch. 6. p. 171—200.; Id. ch. 3. p. 120—130.

disposed of by the sovereign is a matter which is left to conjecture. It suffices to mention, that when the naval transactions of this country became more frequent and more important, a generous but sagacious policy was exercised by the sovereign, and this kind of property was bestowed on our sailors as an additional impulse to their courage and enterprise.* But the admiral was always invested with the power of judicially distributing this bounty from the earliest times: perhaps the most ancient evidence of this jurisdiction of the admiral (whether by special commission for that purpose, or otherwise, does not appear) is handed down to us by an ancient instrument in Rymer, vol. vi. p. 15. It is a letter from Edward III. to the King of Portugal, and recites a complaint that the admiral, before whom the goods were judicially demanded, determined that they should not be restored, as having been taken in time of war. *Præsertim cum Admirallus noster, coram quo bona hujusmodi fuerant ab occupantibus ipsorum JUDICIALITER repetita.*† "It is the common practice of European

system thus introduced for the purposes of commerce, has gradually extended itself to other objects, as the intercourse of nations has become more free and frequent. New rules, resting on the basis of general convenience, and an enlarged sense of national duty, have, from time to time, been promulgated by jurists, and supported by Courts of justice, by a course of juridicial reasoning, which has commanded almost universal confidence, respect, and obedience, without the aid, either of municipal statutes, or of royal ordinances, or of international treaties."—Story's Conflict of Laws, § 3.

* "Follow and take them, for if they escape, ye lose my love for ever; and *if ye capture them all their goods shall be yours*," said King Richard I. to his sailors, on the occasion of a naval skirmish. See Sir H. Nicolas's History of the Navy, vol. i. p. 121.

† Some further illustrations of the origin of prize may be interesting to the reader; the following is extracted from Sir H. Nicolas's History of the Navy, vol. i. p. 140. "Ships and goods captured from the enemy became the property of the king; but prize-money seems to have been as ancient as the English navy

CHAP. IX. states in every war, to issue proclamations and edicts on the subject of prize; but, till they appear, Courts of

itself, though the amount depended entirely on the sovereign's bounty. In March, 1205, the king granted to the galleymen of the galleys, which Thomas of Galway brought into his service, the moiety of what they had captured from his enemies; and he promised them other recompense according to their services, as he should be advised by his justiciary, so that they should be well rewarded. About the same time the crews of two galleys received one hundred marks, and were promised a moiety of such prizes as they might take from the enemy; and, on another occasion, 100*l.* were advanced to the mariners and galleymen out of the money produced by the sale of the goods of a ship, which, coming from Normandy, was captured in Wales. The king disposed of prizes as he thought proper; retaining some vessels for his own use, and bestowing the remainder on his favourite or deserving subjects. A French ship, called The *Countess*, was given to his natural brother, the Earl of Salisbury. Of the other prizes, the best ship was to be reserved for the king; the second best was given to Richard de Mariscis, Archdeacon of Northumberland; and the third best to William de Briwere. Philip de Ulecot, and the Archdeacon of Durham, had also ships given to them; and, the cloth taken in the vessels at Barfleur, in 1212, was directed to be sent to the king at the Tower of London."

The grant of a moiety of prize is made by the Crown in 1242, and is there recorded by the same learned historian: "Permission was granted to the inhabitants of Bayonne to attack the French and others at war with the king, by sea and land; and in reward of their services, they were promised the first thousand marks belonging to the king, arising from whatever property they might take from the enemy, to assist them in enclosing their town, together with one moiety of the remainder of such property for their wages; but the other moiety was to go to the king."

The following is abridged from Sir C. Robinson's "Collectanea Maritima," in which that learned writer endeavours to trace the history of the interest of captors in prize: "Before the reign of Henry VIII., there was not any fixed and constant navy royal. Before that time, the ports and maritime towns of the kingdom fitted out on proper summons their quota of ships of war for the public service, which met at a certain place of rendezvous, and put themselves under the conduct of the king or his admiral. The manner in which prizes, taken in those expeditions, were anciently distributed amongst the fleet, is recorded in the black book of the Admiralty, according to the following proportions: —

"Item s'il avient que desoubz les gages du roy, sur la mer, ou

Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they CHAP. IX.

en ports, biens des ennemys estre gaignez par toute la flotte, ou par parcelle d'icelles, donques aura et prendra le roy de toutes manères diceulx biens la quarte partie, et les [*Seigneurs*] des nefs une autre quarte partie, et l'autre moitie diceulx biens auront les gaigneurs diceulx; la quelle moitie doit estre entre eux egalement parties, de la quelle moitie aura l'admiral en chacune nef deux shares,—c'est a dire, autant comme deux mariners, s'il est present au temps que la prise est faitte; et s'il est absent, donques ils n'aura forsque de chacun vessel ung share. Et iceulx de la flotte qui sont hors de veve, autemps de la prise, n'auront nulle parte d'icelles, s'ils ne sont segglants vers la prize, et dedens la vene, perainso qu'ils soient semblables d'aider au captours de la prise avec leurs voiles, se mestier estoit!

"Item se hors de gages du roy aucunes biens par galliotes, ou autres, soient pris sur la mer, donques le roy ne chalengera nul droit, ne proprement aura nul par mais iceulx qui gaignez les auront, forspris que l'admiral en aura deux shares, en chacune nef comedit est, c'est a dire autant comme deux hommes, l'une share avec la mayne, et l'autre avec la vitaile et la nef."—Book A, Art. 19, 20.

Henry VIII. put the navy of England on a better footing by building ships of war and erecting yards and magazines. (Anderson's Hist. of Commerce.) In the third year of this king's reign, a naval expedition was set forth, entirely at the expense of the king, although all the ships, except the *Regent*, appear to have been hired vessels. There is an instrument respecting this expedition preserved in Rymer, which shows the state of the navy at that time as to the pay of the several ranks, and the distribution of prize-money. It is drawn up in the form of a contract, and is entitled, A Pair of Indentures between the King and the Admiral, by which "the admiral was to have eighteen ships, armed and equipped, at the king's charge, and manned by 3000 men, harnessed and arrayed, over and above 700 soldiers, marines, and gunners, that shall be in the king's ship, called the *Regent*." For his own wages and diet, the admiral was to have ten shillings a day; each of the eighteen captains, eighteen-pence; the soldiers and mariners per month, ten shillings, *i.e.* five shillings for wages, and five shillings for victuals; and with respect to prizes, "for as much as our sovereign lord, the king, at his costs and charges, victualleth the said army and navy, the said admiral shall answer the king one half of all manner of gains and winnings of the werre, one ship royal, being of the portage of two hundred tons, with the

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afterwards conform to the express regulations of their prize acts."*

This jurisdiction of the Admiralty Court could, of necessity, be only exercised when this country was at war, and therefore, as in times of peace, this branch of the Admiralty power must have laid dormant in some instances for many years, the ancient practice appears to have been to call it to action by special commission from the Crown (although none have issued since the reign of Elizabeth). Thus it was, doubtless, that this branch of the Admiralty jurisdiction has been always separated from the Instance Court, the whole system of litigation, proceeding, and jurisprudence of the former being distinct from that of the latter, and, as was observed by *Lord Mansfield* in the case of *Lindo* v. *Rodney*, "the Prize Court is peculiar to itself; it is no more like to the Admiralty (viz. the Instance Court) than to any Court in Westminster Hall. The Instance Court is governed by the civil law, the laws of Oleron, and the customs of the Admiralty, modified by statute law. The Prize Court is, to hear and determine according to the course of the Admiralty and the law of nations. The end of a Prize Court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly *velis levatis*, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may, and must force every person interested, to defend,

The *Prize* Court and the *Instance* Court of Admiralty completely distinct.

The end of the Prize Court.

ordinance and apparel of every such prize that shall be taken, and reserving to the king all artillery contained within any other shippe or shippes by theym to be taken."—Rym. vol. xiii. p. 326.

* *Per Cur.* *The Santa Cruz*, 1 Robinson's Admiralty Reports, 61.

and every person interested may force him to proceed to condemn without delay."*

Thus it is, that from time immemorial the Court of Admiralty has exercised an exclusive jurisdiction in these matters, and the question of "prize or no prize," with its consequences, has been cognisable alone in the Admiralty Court. Prizes being acquisitions *jure belli*, and, the *jus belli* being determinable by the law of nations, and not by the particular municipal law of any country, the Courts of common law have studiously avoided any interference whatever in the jurisdiction of the Admiralty Court in these questions; for, independent of their want of authority, the inconvenience would be intolerable if they did so; so that where a ship is taken as prize, no action at common law for trespass, &c., can lie; for the Admiralty Court has sole jurisdiction. If such an action (viz. at common law) could be sustained, the inconvenience would be so great that no officer would venture to seize a ship as prize, "for he must do it at the peril of his utter ruin, since, if he were mistaken, he would be liable to an infinite number of actions†, the costs of which alone no private man could discharge. The convenience would be none, because by one suit in the Admiralty Court each individual is entitled to recover a full recompense for the injury he may have sustained. Neither could such an action be maintained at common law, after a sentence in the Admiralty Court declaring the ship to be no prize; for the taking is as prize, and that sentence does not alter the original taking, and the subsequent matter cannot be triable at common law; for if the original taking be not a trespass conusable at common law, the sentence of the Admiralty Court cannot give a juris-

The prize jurisdiction of the Court of Admiralty is exclusive.

So where ship is taken *as prize*, no action at common law can lie;

neither if the sentence in the Admiralty Court be — no prize; for the taking is as prize.

* *Per Cur. Lindo* v. *Rodney.*

† *Per* J. Buller, *in Le Caux* v. *Eden.*

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diction to the Court of common law, which it had not before.

The question of prize is tried in the Admiralty Court without reference to the *place* where the cause of action arose; and thus prohibition, moved for to stop the Admiralty Court from proceeding on the ground that the goods were taken *on land*, was denied;

It has been previously remarked, that the nature of the question of prize is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations, and entirely without reference to the *place* where the cause of action arose. A celebrated case in the Court of King's Bench, in which Lord Mansfield gave a most elaborate judgment, may be considered a fundamental decision on this point. The case was brought before the King's Bench, by several applications for prohibition to stop the judge of the Admiralty Court from proceeding upon a monition issued in the usual form, in order to the condemnation of goods, wares, merchandizes, arms, stores, and ammunition, taken and seized by his Majesty's land and sea forces, under the command of Admiral *Rodney* and General *Vaughan*, at the island of *St. Eustatius*, and its dependencies upon the surrender of the said island; and citing all persons to show cause why they should not be pronounced to have belonged, at the time of capture and seizure, to our enemies, and, as goods of enemies, or otherwise, liable to confiscation, be adjudged and condemned as good and lawful prize. The ground upon which the prohibition was prayed was, that the island was taken possession of with every thing whatsoever therein being, and that *the goods were taken upon land* in the said island of *Eustatius*. It was held, that the goods being taken on land, in consequence of a previous surrender to ships at sea, could not exclude the only prize jurisdiction known in this kingdom. The statutes 13 and 15 Ric. 2., and 2 Hen. 4., manifestly relate to the Instance Court of Admiralty, in such causes, *civil and marine*, to *contracts, pleas, and quarrels*, as are triable at common law; and the view, purport, and tendency of those statutes was, to prevent the

Admiralty from trying matters triable at law. The taking a ship upon the high sea is triable at law to repair the plaintiff *in damages;* but a taking on the high sea, *as prize,* is not triable at law to repair the plaintiff in damages.* The nature of the ground of the action—prize or not prize—not only authorizes the Prize Court, but excludes the common law. The Prize Court has uniformly, without objection, tried all captures in ports, havens, &c., within the realm (not so the Instance Court). As to the objection, that in the prize commission no jurisdiction is given for prize taken on land:—1. "upon the words of the commission, the commission certainly has in view captures by ships. Hostilities are committed by ships, and the men aboard, at sea or ashore; a fight begins; the vanquished runs ashore; gets the goods out; is pursued ashore, and the goods are taken.

for the nature of the question excludes the common law.

The words of the prize commission are general;

"A fort or town is taken by the force of ships at sea, and is ransacked; or plate, money, and valuable effects taken.

"The means this country has of annoying and making reprisals upon an enemy, is by naval expeditions. There never was, there never will be one, no, not a single ship, which has not a view to operations on

* "As to plunder or booty, in a mere continental land war, without the presence or intervention of any ships or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot, or wrongfully taken by them, contrary to military discipline. If there is any dispute it is regulated by the commander-in-chief. There is no instance in history or law, ancient or modern, of any question before any legal judicature, ever having existed about it in this kingdom. To contend, that such plunder was within the rules and jurisdiction of the Prize Court, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge." *Per* Lord Mansfield.

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land if occasion should offer; they are often the main view. Sir *George Rooke* at *Vigo;* Admiral *Vernon* at *Porto Bello* and *Carthagena;* Lord *Anson* in the *South Seas;* Sir *George Pocock* at the *Havannah;* many last war to *Martinico, Guadaloupe,* and other places. * * *

" It is not by accident that the words of the commission are general. All manner of captures, seizures, prizes, and reprisals, of all ships and goods. It don't say, upon the sea; it don't say, goods in the ship. 'Reprisals' is the most general word that can be used.

the reason of the thing demands that they should be so.

" 2. The reason of the thing requires the words should be general.

" It is the view of every ship, much more of every fleet, which sails, to make reprisals, to act on shore. There is no place of note which can be attacked, where neutral or *British* subjects do not reside, or have property, or where the enemy may not colourably borrow their names.

" If it is not within the jurisdiction of the Prize Court, consider the consequence to the captors, to the claimants, and to the state.

" The captors are in a miserable condition, indeed. The prize cannot be condemned. If granted, it cannot be shared. Every officer and sailor may be liable to actions without number. The taking cannot be disputed. To disprove the property they can only have witnesses from abroad, who cannot be compelled to come. The grounds upon which the Prize Court condemns or acquits, cannot be read at law; and, in every action, where the plaintiff recovers to the value of a farthing, the captor must pay the costs.

" Colourable claimants might easily ruin the captors, through their want of the means of defence.

" It would be equally mischievous to fair claimants. They could not have their property restored instantly, upon their own papers, books, and *affidavits.* They

must make formal proof, and the owners or crew of a privateer, all the while, might be spending the effects. But to the state the consequences would be still more mischievous. No distinction could be made between British and neutrals. If the jurisdiction is null by the statutes*, or never was given, it can no more be exercised in the case of a neutral, than in the case of a subject.†

"By the law of nations and treaties, every nation is answerable to the other for all injuries done by sea or land, or in fresh waters or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for the trial of prize. Every country sues in this Court or the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captors for damages, and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation of which he is totally ignorant, and subjects his property to the rules

* 13 & 15 Rich. 2., and 2 Hen. 4.

† It does not appear that there was ever any interference given by the municipal Courts of England in prize proceedings. The following is the tenth article of a treaty of peace and commerce concluded between Charles VIII., King of France, and Henry VII., King of England, at Boulogne, 24th May, 1497. "*Quod judicibus supremarum curiarum præcipiatur, ne inhibeant aut alio quovis modo se intromittant in his causis maritimis, etiamsi ad eos appelletur per alteram partium, de dictis judicibus inferioribus vel maritimis.*" This treaty is printed in Robinson's *Collectanea Maritima*, and, that learned writer observes, in reference to it, "Whether this article refers to any interference that had been given in prize proceedings by the municipal Courts of England or France, does not appear." It may be collected, however, from this article, that it was the opinion of those times, that causes of prize were to be matters of *exclusive* jurisdiction in Courts of Admiralty.

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and authority of a municipal law, by which he is not bound.

"Every reason which created a Prize Court, as to things taken upon the high seas, holds equally when they are thus taken at land."

Several authorities were quoted by Lord Mansfield, satisfactorily demonstrating the jurisdiction of the Admiralty Court as exclusive, for goods taken as prize, whether by land or by sea; that so far back as particular cases could be traced, the Admiralty has judged of and condemned, goods taken on land as prize, as well as goods taken on sea. That every common law authority to be found on the subject, allows and supports the jurisdiction*; and that the legislature has, in many acts of parliament, recognised and referred to it as clear, certain, and undoubted.†

Where sentence of condemnation is pronounced in the Admiralty Court, the courts of common law cannot examine the justice of it;

The Prize Court having, then, the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the Prize Acts, it has been judicially determined by the highest authority, that, if a sentence of condemnation is pronounced in that Court, adjudging who are the captors, the Courts of common law cannot examine the justice or propriety of it, even though, perhaps, they would have put a different construction on the Prize Acts.

the Court of Admiralty can enforce its decrees,

The same Court has the power of enforcing its decrees; and, where a monition has issued after sentence to a

* *Brown and Burton* v. *Franklyn*, the king's proctor, Scacc. H. 10. W. 3. Carth. 474. Brown and Burton, masters of two ships, without letters of marque, took a French ship, &c., upon land. The king's proctor obtained sentence of condemnation, as perquisite of Admiralty. Brown and Burton moved for a prohibition, suggesting the statutes of 13 & 15 Rich. 2, and 2. Hen. 4., and that the ship, &c., was taken *on land*; prohibition refused.

† The same question, in *Mitchell and another* v. *Rodney and another*, was also tried before Lord Mansfield with the same result, and the judgment of his Lordship was confirmed in the House of Lords.

navy agent, employed by persons supposed to be entitled to the prize, requiring him to bring the produce of it into Court, to be distributed among the persons declared to be entitled by that sentence, the superior Courts will refuse to interfere.*

and after sentence can issue monition against persons in possession of the proceeds of prize.

We have seen before†, that no right is *actually vested* by any of the Prize Acts in the captors of enemy's goods taken in war, before the *ultimate* adjudication of the Prize Court. In a solitary case in the Common Pleas this principle was lost sight of; and on the ground that a legal right was vested in captors on the property taken being condemned, a prohibition was granted to that Court, having issued a monition to the prize agent to bring in proceeds, on the ground that the monition was contrary to the *legal vested right* of the captors. But on a writ of error to the King's Bench, this judgment was reversed, and prohibition was refused. For Prize Courts have jurisdiction over the questions of prize or no prize, and who are captors, *notwithstanding any of the Prize Acts;* and the monition of the Prize Court does not interfere with nor defeat any vested rights.‡

It is a principle recognised by the Admiralty Court, and confirmed by the common law Courts, that the proceeds of prize may be followed wherever they can be traced; and the Admiralty Court has authority to enforce a monition against any persons who have the proceeds of prize in their hands, knowing them to be such.§

Where a ship and cargo have been taken as prize,

* *Lord Camden and others* v. *Home*, 4 Term Reports, 382.

† Vide supra, p. 217.

‡ See the same case in 1 H. Black, 475, and 2 H. Black, 533.

§ See *Pomona*, M'Naught, 1 Dodson's Admiralty Reports, 25, and 45 Geo. 3. c. 72. For attachments decreed against prize agents, see note to p. 23; 1 Haggard's Admiralty Reports. For responsibility of prize agents, their bail, &c., see *Triton*, 1 Haggard's Admiralty Reports,

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The Prize Court has also jurisdiction over the freight; and thus during the proceeding in that Court, the courts of common law will not try an action for the freight.

the Prize Court has also jurisdiction over the freight. The question of freight must be determined by the same Court which determines the principal question of prize, or the Courts of common law would have to be converted into Prize Courts: and thus, in a case at common law where a plaintiff sought to recover passage money on an implied assumpsit *pro rata itineris peracti*, it appeared, that he had contracted to carry defendant, his family, luggage, &c., from Demerara to Flushing, and in the course of the voyage, within four days' sail of Flushing, the ship was captured by an English ship of war and brought into England; the ship and cargo were libelled for prize in the Court of Admiralty, the cargo was condemned, and proceedings were still pending against the ship; but the defendant and his family were liberated, and their luggage, in fact, restored to their possession. The Court was of opinion, that, however the question might be as to the plaintiff's right to recover passage money upon an implied assumpsit *pro rata itineris*, if the ship were restored, yet, pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained; for the result of the proceedings in the Court of Admiralty might be the condemnation of the ship, and decree of her freight to the captors, and whilst that suit is pending no action could be brought.*

The Prize Court has jurisdiction over the freight, even after the principal question of prize has been determined;

And the Prize Court having jurisdiction over every person who obtains the possession of the proceeds of any prize, can enforce the captors to bring in freight, even after the goods have been declared lawful prize, and delivered to the captors, if the freight has not been adjudicated upon; for where, in a proceeding in the

290. *Trabacolos*, Ibid. 294. For the authority of the Court over the Commissioners of Appraisement and Sale, see the *Princessa and La Reine Elizabeth*, 2 Robinson's Admiralty Reports, 31.

* *Muloy* v. *Backer*, 5 East, 316. 1 Smith, 447.

Admiralty Court, a ship and cargo were libelled as prize, and the ship was ordered to be restored as the property of a neutral claimant, and the cargo delivered to the claimant as condemned prize, but as the question of freight was reserved for future consideration, bail was taken to answer such future demand; this bail was found insufficient, and the Court of Admiralty issued a monition against the captors, as owners or agents of the prize goods, to bring into Court *the produce remaining in their hands* to answer the freight. A prohibition was applied for on the part of the persons thus monished, on the ground, principally, that the Court of Admiralty, after such delivery had been made to the captors, had no further jurisdiction than by the bail entered into. But it was held by the unanimous opinion of the justices, that whether bail be taken or not, whether any fide jussory caution be or be not entered into, such bail (or caution) being only an additional security, that the Admiralty had jurisdiction over all proceeds of prize against those persons having possession of them, even after condemnation. Had the question been, whether the plaintiffs were liable *as bail*, it might have been different; but they were not called upon in the character of bail, but as *having possession of the proceeds*. "If," said Lord Kenyon, "so soon as the property is thus delivered into the hands of the captors, the Court of Admiralty has no longer jurisdiction over it, and can only proceed against sureties for the amount of bail, that would be highly inconvenient, and, indeed, would completely shut the doors of justice; for if the Admiralty Court be then *functus officio*, and the bail be insufficient, what is to become of the freight? A Court of common law cannot take cognizance of freight; it involves in it the question of prize, and whether or not the goods are contraband; and many other questions which depend on the treaties made with

even after delivery has been made to the captors;

and that whether bail be taken or not.

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foreign powers, of which this Court (King's Bench) knows nothing, but all which must be subjected to the decision of some *forum*, governed by the same rules in all countries."

It is hardly necessary to mention, that that caution with which the Instance Court of Admiralty formerly proceeded in questions of property or title in ships, was never observed in the Prize Court, its jurisdiction over such subject being of necessity more extensive; and in that Court the *onus probandi* is always on the claimant for restitution. "In the Prize Court special reasons for deception are perpetually occurring, and that Court exercises a much more unconfined jurisdiction in questions of property than it does in its civil forum." *

The Court of Admiralty has power to decide, as well the question of freight,

The general rule is, that where a Court has jurisdiction in the principal question, it has jurisdiction incidentally over all matters connected with the original cause; and thus it is, that where a ship and cargo have been taken as prize, the Court of Admiralty, as has been mentioned above, has an undoubted jurisdiction over the freight. † To decide, for instance, whether, if the cargo be condemned, freight should not be restored to a neutral claimant, whether freight be due for the whole voyage, or only *pro rata* ‡; also to decide between

* *Per Cur. The Countess of Lauderdale*, 4 Robinson's Admiralty Reports, 286.

† *Smart* v. *Wolff*, 3 Term Reports, 323.

‡ *Capture is considered as delivery, and a captured vessel earns a whole freight.* But it frequently happens that the case is of *mixt* nature, and that the captor does not fully succeed to the rights of the enemy, and represent him as to those rights. "If," said Lord Stowell, "a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and, although the whole freight has not been earned by the completion of the voyage, yet, as the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to

as upon claims by transhippers, material men, of demurrage,

the owners of the ship and the owners of the cargo, claims by transhippers, material men, &c. *; all those questions, which are incidental to the ship and cargo, having been seized as prize. As, for instance, to determine whether demurrage be due, not only from the captors †, but also from the owners of the cargo to the owners of the ship ‡; whether freight be due, not only from the captors where the cargo is condemned to them, or to the captors where the ship is condemned to them §,

the payment of the full freight. But if ship and cargo, being both neutral, are restored, the consequence is only, that the ship must proceed on, and complete the voyage before she can demand the freight. If the cargo is restored whilst the ship continues under detention, still less reason is there to contend that she has earned her whole freight." Such was the case of the *Copenhagen*, where the ship had failed in her contract, but it was not in any manner owing to the cargo that she had done so, but to her own (the ship's) distress originally, and afterwards to her dubious character, dubious — namely, whether enemy or neutral; and under those circumstances it was held by the Court, that the ship had only earned freight *pro rata itineris*, and was referred to the registrar and merchants in the usual manner.

* Bottomry is not such an interest as is cognisable in the Prize Court, so as to give a *persona standi* in a claim for restitution against captor. *Tobago*, 5 Robinson's Admiralty Reports, 218.; see also 2 Robinson's Admiralty Reports, 5. In the *Nostra de Conceicas*, the amount of repairs &c., and money expended on a ship purchased under an illegal title were allowed. See 5 Robinson's Admiralty Reports, 294.

† In the *Corier Maritimo*, 1 Robinson's Admiralty Reports, 287. Demurrage given against captor for unjustifiable detention and delay in proceeding to adjudication.

‡ Refused against cargo where the detention appeared necessary to prove the dubious character of the ship. *Copenhagen*, demurrage given. *Triton*, 4 Robinson's Admiralty Reports, 78. See *Star*, Ibid., 71.

§ Freight is payable to the captors when they have carried the cargo to the place of its original destination. *Fortuna*, 4 Robinson's Admiralty Reports, 278; and where captors had carried cargo, not to the actual port of destination, but to the claimants own country, and to the ports to which they would have consigned them, if not prevented by political state regulations, *Diana*, 5 Robinson's Admiralty Reports, 67.

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of transhipment of cargo, and by whom such claims respectively are to be satisfied; and thus to decide questions of average.

but also from the owners of the cargo to the owners of the ship*; what sum of money is due for transhippers of cargo, where a transhipment has been necessary, and from whom, whether from the owners of the cargo, or from the owners of the ship; and where repairs are necessary, whether the owners of the ship, or the owners of the cargo, are liable. And thus is the Prize Court called upon to decide questions of average, whether the average be simple or particular on the cargo only, or whether it be general, affecting the cargo in common with the ship.† In the case of the *Hoffnung*‡, a claim of average on the part of the captors in right of the cargo against the ship, was demanded to recover the value of part of the cargo which had been applied to the reparation of the vessel in the port of

* The *Wilelmina Eleanora*, 3 Robinson's Admiralty Reports, 234.; see also the *Racehorse*, Ibid. 101., and the *Martha*, Ibid. 106, in notes.

† The *Copenhagen*, 1 Robinson's Admiralty Reports, 289. "General average is for a loss incurred, towards which the whole concern is bound to contribute *pro rata;* because it was undergone for the general benefit and preservation of the whole. *Simple* or *particular* average is not a very accurate expression, for it means damage incurred, by or for one part of the concern, for which that part must bear alone, so that in fact it is no average at all; but still the expression is sufficiently understood, and received into familiar use. The loss of an anchor or cable, the starting of a plank are matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage, it would be a matter of simple average which the goods alone must bear, and there might be a simple average, for which each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause, as if a water-spout should fall on a cargo of sugars, and a plank, from the same violence, should start at the same time. General average is that loss to which contribution must be made by both ship and cargo, the loss or expense which the loss creates, being incurred for the common benefit of both."—*Per* Lord Stowell in the *Copenhagen*.

‡ 6 Robinson's Admiralty Reports, 383.; see also note to that case.

Ilfracomb *before* the seizure, but was not sustained: the cargo seized as prize was condemned, and the ship was restored; the following is a great part of the valuable judgment of Lord Stowell: "Cases of average on the part of the ship against the cargo are not unfrequent, but a demand of the cargo against the ship is perfectly novel in this Court. The distinction is obvious, the right of war is a *right in re*, and the Court of Prize accordingly attends only to the *res ipsa*, and the *onera* attaching on the property in right of possession. The ship has the possession of the cargo, which the master is not bound to deliver till he has been satisfied for his demand of average, if he has such, in the same manner as for his demand of freight. He has the *res ipsa* in his possession, and may legally detain it.

"The captor succeeds to the rights of the owner of the ship when that is condemned, and may detain the cargo also, in virtue of these rights when they exist. But with respect to the cargo it is very different; that has not in any manner a right of possession against the ship. It may have the *jus in rem* possibly, but it has not the *jus in re;* and, consequently, no right of detention existing at the time of seizure. If there is any demand on that side, it must be enforced by a new process; there *can be no* detention, and, consequently, no right of detention. The demand must be of that description of interests only, which are collateral and *extrinsic*, and which are to be enforced on principles of law of another species, and by a new process. They are not tangible objects to which the hand of war can be applied, and therefore the Prize Court will not take notice of them. Indeed, how could the claim of the cargo against the ship be enforced in this Court? If the ship goes into the country of the owners of the cargo, it may be reached by process of another kind, but only in virtue of an implied contract in law. That is the state of this

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demand; it is one that could be enforced only in the country to which the *parties belong*.

"It has been said in argument, that the captor succeeds to all the rights attending the property, and that he is subject to all the obligations belonging to the property seized. But this is not an accurate description. It is not, I conceive, a complete representation of all the interests and obligations of the proprietors that is devolved by act of seizure on the captor. The right of capture attaches according to the state in which the property is found, but if a former freight is due to the ship, the captor could not exact it since he has not earned it. The owner of his ship has parted with his lien, and must look to his remedy of another species. Neither does the captor become subject to the obligations to which the owner is liable. Antecedent collateral contracts, as bottomry, may exist, that will not affect him; he becomes possessed of the *res ipsa*, but without being made liable to the personal contracts in which the proprietor is engaged. Therefore, unless it can be shown that the hand of capture was employed on these goods in quality of cargo, the Court cannot go back to effect them in any other character. This cannot be maintained. The ship had been totally restored, and part of the cargo had been converted before seizure. What has become of it the Court will not inquire, nor look back to rights of this extrinsic nature.

"If the whole cargo had been applied to the repairs of a ship in a foreign port and incorporated with it, and the *vessel* had afterwards become prize, the captors might have had the benefit of that conversion, yet they would not have been subject to any demand on that account: still less could they in that case say, you must find me a cargo, when, in fact, they had received it in the amelioration of the ship. So in this case they are not entitled to demand the proceeds of a cargo applied

in the repairs of a ship. I am of opinion, therefore, that the debt, if it is to be so called, due from the vessel to the owner of the cargo, is amongst those *onera* which the Prize Court does not notice, and that the claimant of the ship is entitled to his dismissal."

The Prize Court proceeds according to the law of nations.

The Prize Court is, we have seen, a Court of the law of nations though sitting here under the authority of the sovereign of England, and it has been frequently remarked by Lord Stowell, that that Court belongs to other nations as well as to our own; "what foreigners have a right to demand from it, is the administration of the *law of nations*, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they had at all times expressed no inconsiderable repugnance."* The duty of the Prize Court of Admiralty has frequently been declared to be, to administer the law of nations to the subjects of other countries, in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilized states.† The constitution of the Court of Admiralty, and its proceedings by

* *Per* Lord Stowell, the *Recovery*, 6 Robinson's Admiralty Reports, 341.

† *Per Cur.* the *Fox and others*, Edwards's Admiralty Reports, 311. On another occasion Lord Stowell is reported to have said, The seat of judicial authority is locally here in the belligerent country according to known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question if sitting at Stockholm. To assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances, and impose no duties on Sweden as a neutral country, which he would not admit to belong to Great Britain in the same character.

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law of nations, with reference to the legislative rights of the king in council, have been so beautifully illustrated by Lord Stowell, that such illustration is without much curtailment here inserted.

The legislative power of the king in council over the Admiralty Court.

But the Court of Admiralty, in this administration of its unwritten law of nations, has frequently been controlled or guided by the orders in council, proclamations, &c. of the sovereign. The following is an illustration, or the substance of it, by Lord Stowell, in a case in which these legislative rights of the Crown over the proceedings in the Admiralty Court, according to the law of nations, were fully discussed.

"It is strictly true, that by the constitution of this country, the king in council possesses legislative rights over the Prize Court of Admiralty, and has power to issue orders and instructions, which it is bound to obey and enforce; and they constitute the written law of that Court.* These two propositions, that such Court is bound to administer the law of nations, and that it is bound to enforce the king's orders in council, are not at all inconsistent with each other, because these orders

* A very recent work on international law, contains a serious objection or regret, that by the British constitution, the king in council should possess legislative rights over the British Prize Courts, on the ground that it necessarily follows that the king in council may, in various important points, alter the law of nations, which a British Prize Court is bound to obey; and that, if the power of control and alteration be admitted generally, the result in future may be different to what it has been. "As little do we think," continues the author of that work, "the eminently talented judge, *fortunate* on this occasion in his illustration of the unwritten law of nations, bearing a relation to the order of the king in council, similar or analagous to what the unwritten or common law of England bears to the acts of parliament, the statute law of England. From the nature of the internal constitution of civilized states, the supreme legislative power necessarily controls and modifies by its acts or statutes, the unwritten or common consuctudinary and judiciary law of a nation. But among nations there is no such supreme legislative power, except the Almighty Creator."

and constitutions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them, cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself; or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing. The constitution of the Prize Court, relatively to the legislative power of the king in council, is analogous to that of the Courts of common law, relatively to that of the parliament of this kingdom. These Courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in acts of parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general speculations. What would be the duty of the individuals who preside in those Courts, if required to enforce an act of parliament which contradicted those

The constitution of the Prize Court, relatively to such legislative power is analogous to that of the courts of common law relatively to that of the parliament.

The necessity of the Prize Court being *supreme* is then advocated. "The constraint," it is remarked, "which might thus be imposed on the executive, would be rather salutary as otherwise, inasmuch as the king and council *would thus be merely put upon their guard* not to issue any orders in council, which the international Prize Courts would not have it in their power to sanction and enforce in conformity with the law of nations."—*Researches, Historical and Critical, in Maritime International Law, by James Reddie, Esq., Advocate.* The objection of the learned author is one of inconvenience; but allowing the question to be open to an argument *ab inconvenienti*, surely the inconvenience of this restraint upon an undoubted prerogative of the Crown, and that too by a Court of Justice, would be greater than the one lamented.

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principles, is a question which I presume they would not entertain *à priori*, because the Court will not entertain, *à priori*, the supposition that any such will arise. In like manner, the Prize Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law. The case from which this doctrine is extracted, was one in which Lord Stowell condemned an American vessel under the retaliatory orders in council of the *British* government. *France* had declared, that the subjects of other states should have no access to *England; England*, on that account declared, that the subjects of other states should have no access to *France*. As *retaliatory* orders, they were held conformable to the principles of the law of nations. They were declared retaliatory orders in their own language, and in the uniform language of the government which had established them. "I have no hesitation in saying," said Lord Stowell, "that they would cease to be just if they ceased to be retaliatory, from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate." But, as it was neither proved that the English government had, in fact, revoked these orders, nor that the enemy had made a *bonâ fide* retractation of those measures, the ship was condemned as prize.*

And, although the Court of Admiralty is properly and directly a Court of the law of nations only, and not intended to carry into effect the municipal laws of this

* As to what is, and what is not evidence of the retractation of these measures by the enemy, see the case of the *Snipe*, Edwards's Admiralty Reports, 381.

or any other country, and has thus repeatedly declined taking notice of the private laws of other countries, yet, as it is a *British* Court of Admiralty, and armed with its power from the government of this country, and carrying all its process into effect by the authority of the *British* parliament, it has been judicially determined both in the Admiralty Court and in the Court of Appeal, that, as a *British* Court it is bound to take notice indirectly of a violation of an act of parliament, and that a *British* claimant could not entitle himself to restitution of property, which appeared on the face of his claim to have been employed in an illegal trade, and which had, by some accident, fallen into the hands of a *British* captor.* The law would appear to be this; that where property has been seized as prize, the Court will refuse to restore to a neutral claimant if it be employed either, *first* in a trade contrary to the law of nations, or *secondly*, to a *British* claimant, if in a trade contrary to the municipal law of this country; or *thirdly*, to a neutral claimant if contrary to a municipal law of this country, if such municipal law be also recognized by the state, to which the neutral claimant belongs. This appears deducible from the several cases which are now quoted from; but it cannot enforce municipal regulations of this country against foreigners.† Thus, where in a proceeding against a cargo of slaves, as prize, for engaging in such traffic, the Vice Admiralty Court in Sierra

Although the Court of Admiralty proceeds according to the law of nations, as a *British* Court it is bound to notice indirectly a violation of an act of parliament where the claimants are *British*;

or where the claimants are neutral, if such municipal law be recognised by the state to which such claimants belong; it cannot otherwise enforce municipal regulations of this country against foreigners.

* See the *Walsingham Packet*, 2 Robinson's Admiralty Reports, 77. It was in the *Eliza*, before the Lords of Appeal, (July 13th 1798,) that it was first decided, that the Court of Admiralty was bound to take notice of an illegal practice, evidently appearing in the conduct of a *British* subject, though the illegality arose from the violation of some law merely municipal, and thus that Court is bound to reject the claim of any *British* subject, where property has found its way into the hands of a *British* captor, if the transaction in which that property had been employed was one contrary to *British* law.

† See the *Recovery*, 6 Robinson's Admiralty Reports, 341.

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Leone had condemned such ship as prize, with a sentence, asserting "that the slave trade, from motives of humanity, had been abolished by most civilized nations, and is not, at the present time, legally authorized by any." On appeal to the Admiralty Court of England it was held, that there was no proof that Sweden had done anything in the way of abjuring such trade: this sentence was reversed. For where persons engage in such trade under the sanction of the laws of their own country, the Court of Admiralty cannot interfere*: and again, in the case of *Le Louis* †, a *French* ship, it not having been proved that there was an actual abolition of the slave trade by the *French* law, at the time when the seizure was made, the property was restored to the claimants; for no British act of parliament, nor commission founded upon it, if inconsistent with the law of nations, can affect the rights or interests of foreigners. The point as to how far the Prize Court of Admiralty is bound to notice the municipal law of this country and that of a foreign country, may be well illustrated by the following case before the Lords of Appeal: the *Amedie* had been condemned (both ship and cargo) to the captors, in the Vice Admiralty Court of Tortola; on appeal, the judgment of the inferior Court, as delivered by Sir William Grant, was in the following terms:—"This ship must be considered as being employed at the time of capture in carrying slaves from the coast of *Africa* to a *Spanish* colony. We think that this was evidently the original plan and purpose of the voyage, notwithstanding the pretence set up to veil the true intention. The claimant, however, who is

* *Diana*, 1 Dodson's Admiralty Reports, 95. The treaty between Sweden and England, by which Sweden engaged to prohibit the slave trade, was not made public till after this decision. See note to p. 98, 1 Dodson's Admiralty Reports.

† 2 Dodson's Admiralty Reports, 210.

an *American*, complains of the capture, and demands from us the restitution of property, of which he alleges that he has been unjustly dispossessed. In all the former cases of this kind which have come before this Court, the slave trade was liable to considerations very different from those which belong to it now. It had at that time been prohibited (as far as respected carrying slaves to the colonies of foreign nations) by *America*, but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of *America* in any other light, than as one of those municipal regulations of a foreign state, of which this Court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think as individuals before, we could not, sitting as judges in a *British* Court of justice, regard the trade in that light while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence.

"When I say abstractedly speaking, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that, *primâ facie*, the trade is illegal, and thus to throw on claimants the burthen of proof that, in respect of them by the authority of their own laws, it is otherwise. As the case now stands we think we are entitled to say, that a claimant can have no right, upon principles of universal law, to claim the restitution in a Prize Court, of human beings carried as his slaves: he must show

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some right that has been violated by the capture, some property of which he has been dispossessed, and to which he ought to be restored. In this case the laws of the claimant's country allow no right of property such as he claims; there can, therefore, be no right to restitution. The consequence is, that the judgment must be affirmed." *

But lest any further discussion on this subject should lead us too deeply into the law of nations, whilst to the jurisdiction of the Admiralty Court our attention should be alone directed: and again, as several treaties for the abolition of the slave trade have since been concluded, between England and the other powers of Europe, a further inquiry into how far this trade is consistent with the law of nations is not likely to be of great utility; the less so, inasmuch as the point how far the Court of Admiralty has jurisdiction in that respect, has been shown in a previous part of this treatise.

The Prize Court of Admiralty has jurisdiction over the *proceeds* of prize, &c., taken by a conjoint *British* and *allied* force.

It has been judicially determined, that the Prize Court of Admiralty has jurisdiction over the *proceeds* of prize or booty taken by a conjoint *British* and *allied* force, and brought within British territory; for in a case which arose upon the capture of French Guiana by Portuguese and British forces, the whole of the property seized, &c., was taken possession of by the Portuguese, and on an estimation having been made by the commander of the British forces and the Spanish ambassador, the sum due to the British captors was concluded at *l.*———, and an order by the Portuguese government was made for payment on the Treasury at Maranham; B. B. was sent to the Brazils, and obtained payment. Some years elapsed from the time of the capture, till proceedings were instituted in the Prize Court for condemnation, arising from some misconcep-

* P. 85., 1 Dodson's Admiralty Reports, in notis; and 1 Acton's Prize Cases, 240.

tion that the sum paid was not in the nature of prize, but a gratuity from the Spanish government. However, a monition was decreed, ultimately, against B. B., to bring in the money. He appeared under protest to the jurisdiction; in support of which it was argued, that it was not *prize* and that the Court of Admiralty had no jurisdiction. The Court held, first, that there was no proof of its being a grant or spontaneous gift from the Crown of Portugal. The question was, whether the British forces took any original interest, or an interest derived from subsequent grant, and it was held, that it was the successful application of both forces in an act of joint capture; that it was not a capture of *one party exclusively*, but a *common* capture, viz., *common to both parties;* that the sovereign of the other party, having reserved his share to himself, would be no ground for the exclusion of the interest of the *British* Crown or its grantees: that the Court of Admiralty would have adjudged as *due* to an ally in the war, its proportion of the booty acquired under corresponding circumstances, as legally due, not under the *Prize Act*, but under the *general law of nations*, and that if taken by a joint force, the Court would have said it belongs to both proportionably.*

Where a sum of money is agreed upon instead of the property actually taken, it is not the less prize because it is money.

It was also argued in the same case on behalf of the protest, that as it was a grant of *money* from the Portuguese government, the Court could not proceed as prize; but it was held, that it was not the less prize because it was money. "Suppose," said Lord Stowell, "that the place had been surrendered to a single *British* force, and the captors had agreed to accept a sum of money as the supposed value of the articles, would that sum of money be less *prize* than the articles themselves? I take it to be the usual mode of arranging matters of this sort."

* *French Guiana*, 2 Dodson's Admiralty Reports, 151.

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As to the point in the same case, that the property ought to have been legally proceeded against in the Portuguese tribunals, the Court was of opinion, that a mere majority of force could produce no such obligation; it was admitted by the learned judge, that as the colony now belongs to the Portuguese, that on all questions merely colonial, the jurisdiction of the Admiralty Prize Court was excluded; but this was a question between *British* interests, by which the Portuguese were not affected, and upon which they were judicially silent; and, although it was said, that if the property had been in another kingdom, as in Portugal for instance, the Admiralty Court could not have adjudicated upon it; still, it was a sufficient answer to that averment to say, *here it is*, and, therefore, clearly within the jurisdiction of a *British* Court. Lord Stowell pronounced then for the jurisdiction of the Court on all these several points, that the money was prize of war; prize to the Crown of England, however it might dispose of it; and, that there could be no principle of the law of nations which says, that to vest a right in the spoils of war, the conquest must be effected by a sole force.

The jurisdiction of the Prize Court in *grants* of the nature of prize.

A question before the Prize Court arose on the construction of a grant of a very large sum of money to be distributed to the officers, seamen, and mariners engaged in the capture of Naples; and as there was some difference respecting the title of some of the officers to share as joint captors in the benefit of this grant, it was referred to the decision of the Admiralty Court. It was said by Lord Stowell in that case, "A question has been raised, or rather insinuated than actually contended for, that the Court is not to consider this as of *the nature of prize*, but that the claims of the parties are to be considered upon principles of a more enlarged nature. Now, *prize* it certainly is not, nor from the terms of the surrender can it be considered as

legal prize; at the same time it may be considered as a *grant of the nature of prize.* * * * * * It is to be distributed *as prize money is distributed* among the officers, petty officers, seamen, and mariners, and being referred to this Court, which is a Court of Prize, I apprehend that it was the intention of those from whom that reference proceeds, that it should be considered upon the *principles of prize.*

"It does not belong to this Court to interpret grants; this Court cannot wander into general interpretations of the kind; but if it be a grant of the nature of prize, it comes naturally under the consideration of this Court, which leaves the general interpretation of grants to a jurisdiction of another nature."

In this case, as it was a case of construction of a grant of money from the Crown in the nature of prize, there was no previous condemnation as prize, for prize it was not: but where the proceeds of capture are to be distributed as prize, it is clear that there must be a sentence of condemnation.*

In case of construction of such grant, no previous condemnation as prize is requisite; but before other proceeds can be distributed there must be a sentence of condemnation.

* See *Anglo-Sicilian Captures*, 3 Haggard's Admiralty Reports, 192. See also the *Marianna*, Ibid. 206., where a decree of condemnation in the Vice Admiralty Court at Sierra Leone had been rescinded on a claim by the Brazilian consul in behalf of Brazilian subjects as to some goods on board at the time of seizure, and a decree of one-eighth as due on recapture (the remaining seven-eighths to be droits, if unclaimed) was substituted; a further decree of condemnation, upon a new libel at the instance of the seizors, was made in their favour of those seven-eighths, but still with a reservation as to the goods claimed. There was no appeal nor suit in this Court on respect of these decrees; but the proceeds of the seven-eighths having been paid into the Registry here by a Treasury warrant, an application for payment of this money to the seizors, founded on the processes from Sierra Leone, an affidavit of the seizors' navy-agent, and the non-intervention of the Treasury rejected, there being no legal title in the seizors. "As," said Sir John Nicholl, "this money has been transmitted into the Registry of the Court, I cannot direct it to be paid out, except upon a proper title. That it should have got here seems rather strange,

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For where proceeds have been distributed without the intervention of a Prize Court, the Court will not lend its juris diction.

In the same manner, where captors have proceeded to dispose of prize without the intervention of a Court of justice, and before condemnation have converted the property, the Court will not even consider such property to be the proceeds of prize, so as to be subject to the prize jurisdiction. "Over proceeds lawfully or justifiably converted, the Court has jurisdiction, the property in that case continues prize; but if the parties have departed, without any justification, from their instructions, and have been carrying on a commerce voluntarily assumed, and to any extent, the Court will not continue to property so acquired, the character and favoured rights of prize property in their behalf." *

Questions of head money.

Another species of grant from the Crown, which the Court of Admiralty has frequently been called upon to interpret, are those of head money; for in cases in which doubts have arisen whether parties claiming head money are entitled thereto, the same have been determined by that Court, by the authority of the legislature. † "The legislature, probably, thinking that the history of this particular subject being more familiar to this Court, a question of this kind might probably receive a readier illustration, from its knowledge of the history of the law, than might possibly be within the immediate view

for there has been no proceeding in this Court, either original or by appeal in the matter, and I am at a loss to discover that the Court has jurisdiction at present to make any order regarding the money: at all events, as it has been sent here by the government, there must be a *grant from the Crown*, or some authority produced to which the Court is bound to attend before it can be taken out; and it might have been expected that some directions would have been given to the law officers of the Crown upon the subject, but here is only the *ex parte* application on behalf of the seizor. * * * * I reject the motion."

* *Per* Lord Stowell, the *Eole*, 6 Robinson's Admiralty Reports, 220.

† The 54 Geo. 3. c. 72. and the several Prize Acts.

of those judicatures which are the more regular and constitutional interpreters of statutes." *

By the 3 & 4 Vic. cap. 65. it is enacted, that the High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, her heirs and successors, by the advice of her and their Privy Council, to refer to the judgment of the said Court; and in all matters so referred, the Court shall proceed as in cases of prize of war, and the judgment of the Court therein shall be binding upon all parties concerned.

On the grant of letters of marque; the bail bond required in such case; the forfeiture of such bail bond and the depriving of a ship of such letters of marque by the Admiralty Court.

It is not necessary to repeat, that title to sea-prize must be by commission. On granting letters of marque, it is required that the captain † and two sureties appear and give security that nothing will be done contrary to the instructions which are issued with the said letters of marque; and the Court of Admiralty has the power of decreeing such bail recognizance to be forfeited, and also of proceeding against a privateer ship, to deprive it of its commission or letters of marque, when a forfeiture of the same has been incurred; as by acts of cruelty, for instance, or for any offence, which, by the Prize Acts, and by the ancient law of the Admiralty, is a ground of forfeiture.‡ A privateer ship, when thus duly commissioned, represents public authority.§ We have seen that the Court of Admiralty has jurisdiction

A privateer ship represents public authority.

* *Per* Lord Stowell, *La Bellone*, 2 Dodson's Admiralty Reports, 346.

† But on considerations of convenience, when the captain is absent, it appears that the Court has permitted some other person to appear and be bound for him. Such person is then *himself* responsible. See the *King* v. *Fergusson*, Edwards's Admiralty Reports, 84.

‡ See the *Mariamne*, 5 Robinson's Admiralty Reports, 9.

§ Cannot therefore be dispossessed of a capture by king's ship. See same case.

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Actions for damages, costs, &c., incurred by unjustifiable seizure; or by justifiable seizure where loss has been occasioned by the want of skill, diligence, &c., of the captor.

over all injuries which are consequent to an illegal or unjustifiable seizure; and, where there has been "*no probable ground of seizure*," costs and damages seem incident to a sentence of restitution.* The actual wrongdoer is the person who must be made liable in that Court.† But it is not for damages alone, which are consequential to an unjustifiable seizure in which the Court of Admiralty has jurisdiction (although those are necessarily the most frequent cases in which a captor is liable in that Court); but also where the seizure has been held to be justifiable, some part of the cargo, for instance, having been condemned, in case loss or

* See *Barossa*, 1 Haggard's Admiralty Reports, 75., *in notis*. But where restitution has been accepted by the ship originally seized, without reservation of any question, such a suit was not sustained. See the *Maria Powlona*, 6 Robinson's Admiralty Reports, 236. "In this case," said Lord Stowell, "the claimant has, I think, put himself out of all possibility of obtaining relief. The vessel was a *Russian* ship, carrying a cargo of masts from *Riga* to *Nantes*. This is all which I am able to collect of the circumstances of the case, and *that* only from the protest of the master, since the original evidence is withdrawn. How the vessel was documented, or under what particular circumstances the seizure was made, is entirely removed from the view of the Court. It is, therefore, impossible for me to pronounce, that the person making the capture was so in fault, as to be liable to a sentence of costs and damages. From what has passed, there is reason to presume that the seizure was perfectly justifiable. On the papers being brought in, a proposal was made to the master that he might proceed on his voyage; and it must be understood to have been an absolute and unqualified proposal, and meant as a general acquittal on both sides. If there had been any intention to prosecute a demand for damages arising from the seizure, the offer should have been accepted *sub modo;* instead of that, the restitution was accepted in the manner in which it was proposed, and as such must be understood to include an act of amnesty on both sides. It is not for the parties then to come again before the Court, after all the papers have been withdrawn, and charge the captors with an unjustifiable seizure, when they have, in consequence of the restitution, lost the opportunity of defending themselves."

† The *Mentor*, 1 Robinson's Admiralty Reports, 179.

damage has been sustained by want of *due diligence* on the part of the prize master.*

Sentence of condemnation by a *competent* tribunal necessary to transfer complete possession of goods taken as prize; the tribunal of a neutral country *incompetent.*

We have seen that the sentence of condemnation by a competent tribunal is always necessary to transfer complete possession of goods taken as prize; in no case is the property changed in favour of either a vendee or recaptor till there has been a regular sentence of condemnation; and to be regular, this sentence must be pronounced by a Court of competent jurisdiction in the country of either belligerent, but never in a neutral country†; neither will the Court of Admiralty of

* See the *William*, 6 Robinson's Admiralty Reports, 316., and the following case *in notis*. "On questions of this kind, there is one position sometimes advanced which does not meet with my entire assent, namely, that captors are answerable only for *such care* as they would take of their own property. This, I think, is not a just criterion in this case; for a man may, with respect to his own property encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion. But in cases of capture, there is no confidence reposed, nor any voluntary election of the person in whose care the property is left. It is a compulsory act of *justifiable force*, but still, of such force as removes from the owner any responsibility for the imprudent or incautious conduct of the prize master. It is not enough, therefore, that a person in that situation uses as much caution as he would use about his own affairs, the law requires that there should be *no deficiency* of *due diligence*." See also for other cases of compensation, the *Concordia*, 2 Robinson's Admiralty Reports, 102., where a cargo on restitution being found deficient, compensation in value was allowed. *Der Mohr*, 3 Robinson's Admiralty Reports, 129., compensation in value for a prize ship, lost by the negligence and misconduct of the prize master. *Betsey*, 1 Robinson's Admiralty Reports, 92.; and the *Nicolas and Jan*, therein cited. *Hendrick and Jacob*, Ibid. *Mentor*, Ibid., 181. *Two Susannahs*, 2 Robinson's Admiralty Reports, 132. *Lucy*, 3 Robinson's Admiralty Reports, 208.

† See the *Flad-Oyen*, 1 Robinson's Admiralty Reports, 134. The *Henrick* and *Maria*, 4 Robinson's Admiralty Reports, 43.

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England condemn a vessel as prize whilst it is lying in a foreign port.* And where property had been seized by the enemy and retaken before condemnation, the practice of the Prize Court was to restore to the former owners, there having been no legal conversion, subject to a compensation to the recaptors, which will be presently considered. Thus, by the marine law received and practised in England, there was no change of property till condemnation; but now, by the more recent acts of parliament, in case of a recapture, the *jus postlimini* continues for ever, unless the ship so retaken shall appear to have been set forth by his Majesty's enemies as a ship of war, in which case she shall be deemed good prize to the recaptors, but otherwise to be restored to the original owners.†

With the exception of a ship taken from subjects of this country and set forth by the enemy as a ship of war; every ship retaken from the enemy to be restored to the former owners;

But, whilst we thus observe that all property retaken from the enemy is to be restored to the former owners, still the Admiralty Court has power by those enactments of the legislature, and independent of them, to reward the adventure and merit of those who have effected a service so important to the owners and to the state, and this brings us to that part of the Admiralty jurisdiction which refers to salvage as of war.

on payment of salvage to the recaptors.

In a previous part of this treatise‡ it has been remarked, that salvage is of two kinds, and the distinction between civil and military salvage has been already made. We have also seen, that to entitle a person or persons to the benefit of prize in the Prize Courts, a commission from the Crown is necessary§; it is not so with salvage. "We all know," said Lord Stowell,

No commission from the Crown is necessary to entitle recaptors to salvage.

* *Herstelder*, 1 Robinson's Admiralty Reports, 118, in note.

† Park on Insurance, and the statutes there cited.

‡ See above, p. 184.

§ All title to sea-prize must be by commission, a military force on land not so privileged, and capture by it becomes droit of Admiralty. The *Rebeckah*, 1 Robinson's Admiralty Reports, 227.

"that in recapture no commission is necessary to vest a salvage interest in the captors: it is the duty of every subject of the king to assist his fellow-subjects in war, and to retake their property in the possession of the enemy: no commission is necessary to give a person so employed, a title to the reward which the policy of the law allots to that meritorious act of duty."*

The Court has jurisdiction to award salvage in case of a *foreign ship* rescued from the enemy, where there is a *British* subject concerned in the rescue.

The Court of Admiralty has jurisdiction, and will exercise it, over a *foreign ship* rescued from the enemy, if there be any *British* subject concerned in the rescue who prays to be rewarded in that Court. For salvage is a question of the *jus gentium*, and materially different from any questions of wages, &c., which are contracts, subject to the municipal regulations of different countries. This was the doctrine laid down in a case of salvage† on recapture of an *American* ship from the French by the crew, part of whom were British seamen. Lord Stowell remarked, "Between parties who were all *Americans*, if there was the slightest disinclination to submit to the jurisdiction of this Court, I should certainly not incline to interfere; for this Court is not hungry after jurisdiction, where the exercise of it is not felt to be beneficial to the parties between whom it is to operate. At the same time, I desire to be understood to deliver no decided opinion whether *American* seamen rescuing an *American* ship and cargo, brought into this country, might not maintain an action *in rem* in this Court of the law of nations. But, if there was *British*

* The *Helen*, 3 Robinson's Admiralty Reports, 224.: and thus the army alone have been considered as recaptors, and entitled to salvage in the Admiralty Court, for service done without the co-operation of a naval force. *Progress*, Edwards's Admiralty Reports, 210.: and persons not in a military capacity but merely acting as private individuals, if they happen, by any successful effort, to rescue property from the enemy, will be entitled to salvage. Ibid. 214.

† The *Two Friends*, 1 Robinson's Admiralty Reports, 271.

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property on board, and *American* seamen were to proceed here against that, I should think it a criminal desertion of my duty if I did not support their claim."*

Ship taken from the enemy where such ship belongs to a nation hostile neither to the enemy nor to this country.

It frequently happens, that a ship is taken out of the hands of the enemy, when such ship belongs to a nation not engaged in hostilities either with the enemy or with this country. The probability of its condemnation in the Courts of the country of the captors is then considered, and, unless there appears to be ground on which it may be supposed that it would be condemned in those Courts, it is to be restored without the payment of any salvage.†

The crew of a ship cannot be the salvors of that ship.

We have seen, that the crew of a ship cannot be considered as salvors in the Instance Court, with the exception before mentioned.‡ A salvor has been defined to be a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.§ But with the crew it is otherwise, their stipulated duty being (to be compensated by way of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. So, in the case of the *Governor Raffles*‖, where a motion was

* Where the property of an ally is recaptured, the law is that of reciprocity; and in such case the Court of Admiralty adopts the rule of the country to which the claimant belongs. See *Santa-Cruz*, 1 Robinson's Admiralty Reports, 49.

† See the *Eleonora Catharina*, 4 Robinson's Admiralty Reports, 156., the *War Onskan*, 2 Robinson's Admiralty Reports, 299., where, owing to the rapacious proceedings of the French cruisers, and the irregular proceedings of the French Courts, salvage was given. See also *Carlotta*, 5 Robinson's Admiralty Reports, 54.; and the *Huntress*, 6 Robinson's Admiralty Reports, 104.

‡ At p. 122., for wages.

§ See 1 Haggard's Admiralty Reports, 236.

‖ 2 Dodson's Admiralty Reports, 14.

made in the Admiralty Court for a warrant to arrest the ship and cargo for salvage, as due to the crew of a ship for rescuing it from mutineers, the Court declined to grant the warrant, but allowed a monition against the owners of the ship or their agents, and also against the consignees of the cargo; but they appeared under protest to the jurisdiction; no case could be found in which the Court had taken upon itself to assign a reward for a service of this description, and the suit was dismissed. "It appears to me," said Lord Stowell, "that it is the bounden duty of the crew to give every assistance in their power to prevent or quell a mutiny, and to use their utmost exertions to preserve or recover the possession of the vessel and goods of their employers. The case is extremely different from that of rescue from an enemy, because, *there the moment the capture is effected, the crew are discharged from their duty to their employers. The contract between the parties is at an end: the seamen no longer constitute the crew of the vessel, but become prisoners of war.* Not so in the case of mutiny, for *that* does not discharge them from their duty to their owners, whose property they are bound, if possible, to recover. I do not mean to say, that they are called upon to sacrifice their lives wantonly and to no purpose, but I think they are bound to use their best endeavours whenever there is a reasonable prospect of success."*

It sometimes happens that a service has been rendered to a ship of a nature both military and civil, as for instance, that a ship may be rescued, not only from the hands of the enemy, but likewise from the dangers of the sea; and in such case the practice of the Prize

* This case is distinguished from the *Trelawney*, 4 Robinson's Admiralty Reports, 223. There, the reward was decreed to the crew of another ship who had no duty imposed upon them to effect the rescue.

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Cases in which salvage service both military and civil has been rendered.

Court has been to award compensation for both the salvage as of distress as well as that as of war, and civil salvage has been pronounced due to a King's ship for services rendered to a vessel in distress in addition to the military salvage to which she is entitled by act of parliament for re-capture from the enemy.*

Salvage on donation from the enemy.

In the case of the *Sir Peter* †, a British ship was captured by a privateer of the enemy, but was given back to the master by the commander of the privateer on condition of his bringing the crews of some other prize vessels to *England*. The master then proceeded with his own crew, and those which he had agreed to bring over to England. In the course of the voyage, the vessel sprang a dangerous leak, and reached England with considerable difficulty and exertion on the part of the crew. The master claimed for recapture from the enemy, and with the remainder of the persons on board, civil salvage for bringing the vessel to England. The admitted value of the ship and cargo was 1034*l.* 14*s.* 2*d.*, and the Court awarded 30*l.* to the master, and 100*l.* amongst the others together with expenses. In this case two separate actions were entered, one in the Instance Court for the civil salvage, and the other in the Prize Court for the salvage on recapture from the enemy.

Salvage where property has been taken not from the actual possession of the enemy.

The case of the *Pensamento Felix* ‡, was one of a Portuguese ship with a cargo belonging to British and Portuguese merchants, which had put into the port of *Muros* in Spain, in consequence of her having sustained damage on her voyage, but was brought out by one of H. M.'s ships. The ship and cargo were ordered by the Prize Court to be restored, but as a considerable benefit appeared to have been rendered to the parties interested

* The *Louisa*, 1 Dodson's Admiralty Reports, 317.
† 2 Dodson's Admiralty Reports, 73.
‡ Edwards' Admiralty Reports, 115.

in the property, by reason that the principal persons of the place were in the French interest, and that the French were near the place with every probability of returning, a question arose as to the *nature* of the salvage to which they were entitled; whether the service, principally, was of that description which would entitle the party to salvage under the act of parliament.

It was contended that the service rendered was not of a military kind, and not therefore a matter cognizable in the Prize Court; but Lord Stowell said, "Now supposing it were clear that there really was no salvage as of war, the effect of this objection would only be, that I should put the parties to the expense of a new proceeding in the Instance Court, by transferring this case from one jurisdiction to the other. There is no doubt that the Court of Admiralty has a general jurisdiction to reward services of this nature, and that the party would recover by action in the Instance Court; but then the proceeding there would be attended with fresh expenses. As the question, therefore, has arisen incidentally here, the Court would be disposed to lay hold of any circumstances that might give this service the character of a war salvage, and to press them with more effect than it might otherwise do, for the purpose of bringing the case within the jurisdiction, which has been already exercised upon it; and taking all the circumstances together, I think there is enough to justify the Court in so doing." The Court considered it a military service, and consequently pronounced for salvage under the act of parliament.*

* See also the *Franklin*, 4 Robinson's Admiralty Reports, 147. in which, both military salvage and salvage of distress were claimed; *military*, for *preventing* a British cargo from going into a port of the enemy, held *not due*; but for actual service, in preserving the ship and valuable cargo from *distress*, salvage was awarded. In the *Gaze*, 6 Robinson's Admiralty Reports, 273., a British vessel

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In the case of the *Harmony* *, a British ship and cargo were captured by an American privateer, who took out all the crew except J. N. the mate, and sent an American prizemaster and five Frenchmen aboard with directions to take her to a port in America. J. N. (the Frenchmen not opposing him,) kills the prizemaster, and having prevailed on the crew, the ship is brought to England and arrested at his (J. N.'s) suit in a cause of salvage by reason of recapture. A claim was given for both ship and cargo, and they were restored to claimants on payment of one-tenth to J. N. A claim was subsequently made by the American privateer as the original captor, alleging that the prize had been taken by him within the period prescribed for captures by the treaty of peace between Great Britain and America, and retaken after the period specified in the said treaty, and it was also alleged that no proceedings had been instituted by the recaptor to bring the ship and cargo to adjudication. Monitions were decreed on J. N. and the owners. The owners appeared under *protest*, and on behalf of it, it was submitted that the Prize Court of Admiralty could not take cognizance of the cause nor try the question as to recapture, the same having been effected after the period fixed by the treaty of peace; that the Prize Court of Admiralty has no jurisdiction to take cognizance of any seizures made upon the high seas during a time of profound peace; that no *American* could maintain a suit or action in any British Court of Justice during war; and that after conclusion of peace, by which an *American* could obtain a *persona standi* in a *British* Court, no question of prize could arise, for any

with a cargo of timber, &c., which had been captured by the enemy, but was found abandoned at sea and on fire, the Court felt itself not restricted by act of parliament and allowed a salvage of one-fourth.

* 2 Dodson's Admiralty Reports, 78.

seizure after such period was not in the nature of prize, and the Court having once decreed restitution, it was binding on all parties, and could not be reversed. * But the protest was overruled, the learned judge not having the slightest doubt of the power of the Court to entertain the question. The decree of restitution upon salvage was declared of no effect, for so far as the *American* captor is concerned, it was altogether *res inter alios acta.* The final decree in this case, was, that the ship and cargo be released from the recapture and delivered up to the claimant, commander of the privateer ship.

With respect to the parties liable to pay salvage, and the interest in respect of which it is payable, the rule is, that the property actually benefited is alone chargeable with the salvage recovered. If at the time of the salvage service the earning of the freight has commenced and it be afterwards actually earned, it is liable to pay salvage as well as the ship and cargo.†

* Application was also made for a prohibition, but refused. *Vide* 1 Maddock, 15. *Exparte* Lynch and another.

† Abbott's Shipping, pt. iv. ch. 12. The *Dorothy*, Foster, 6 Robinson's Admiralty Reports, 88. The *Progress*, Edwards' Admiralty Reports, 210.

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3 & 4 VICT. CAP. 65.

An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England.

[*7th August*, 1840.]

WHEREAS the jurisdiction of the High Court of Admiralty of England may be in certain respects advantageously extended, and the practice thereof improved; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That it shall be lawful for the Dean of the Arches for the time being to be assistant to and to exercise all the power, authority, and jurisdiction, and to have all the privileges and protections of the Judge of the said High Court of Admiralty, with respect to all suits and proceedings in the said Court, and that all such suits and proceedings, and all things relating thereto, brought or taking place before the Dean of the Arches, whether the Judge of the said High Court of Admiralty be or be not at the same time sitting or transacting the business of the same Court, and also during any vacancy of the office of judge of the said Court, shall be of the same force and effect in all respects as if the same had been brought or had taken place before the judge himself, and all such suits and proceedings shall be entered and registered as having been brought and as having taken place before the Dean of the Arches sitting for the Judge of the High Court of Admiralty.

Dean of Arches to sit for Judge of Court of Admiralty in certain cases.

II. And be it declared and enacted, That all persons who now are or at any time hereafter may be entitled to practise as advocates in the Court of Arches are and shall be entitled to practise as advocates in the said High Court of Admiralty;

Advocates, surrogates, and proctors of Court of Arches to be admitted

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in Court of Admiralty.

and that all persons who now are or hereafter may be entitled to act as surrogates or proctors in the Court of Arches shall be entitled respectively to practise and act, or to be admitted to practise and act, as the case may be, as surrogates and proctors in the said High Court of Admiralty, according to the rules and practice now prevailing, and observed or hereafter to be made in and by the said High Court of Admiralty touching the admission and practising of advocates, surrogates, and proctors in the said Court respectively.

Whenever a vessel shall be arrested, or proceeds brought into registry, the Court to have jurisdiction over claims of mortgagees.

III. And be it enacted, That after the passing of this act, whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said Court, in either such case the said Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively.

Court to decide questions of title in all causes of possession, salvage, &c.

IV. And be it enacted, That the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said Court after the passing of this act.

Appeals may be made to the Court of Admiralty on distribution.

V. And be it enacted, That whenever any award shall have been made by any justices of the peace, or by any person nominated by them, or within the jurisdiction of the Cinque Ports by any commissioners, respecting the amount of salvage to be paid, or respecting any claims and demands for services or compensation, which such justices and commissioners within their several jurisdictions are empowered to decide under the provisions of two acts passed in the second year of the reign of King George the Fourth, for remedying certain defects relative to the adjustment of salvage, or whenever any sum shall have been voluntarily paid on any such account of salvage services, or compensation, it shall be lawful for any person interested in the distribution of the amount awarded or paid to require distribution to be forthwith made thereof, and the person or persons by whom such amount shall be awarded, or in the case of voluntary pay-

ment the person by whom the same shall have been received shall forthwith proceed to the distribution thereof among the several persons entitled thereunto, to be certified in the case of an award under the hand of the person or persons by whom such amount shall be awarded, and an account of every such distribution shall be annexed to the award; and if any person interested in the distribution shall think himself aggrieved on account of its not being made according to the award, or otherwise, it shall be lawful for him, within fourteen days after the making of the award, or payment of the money, but not afterwards, to take out a monition from the said High Court of Admiralty, requiring any person being in possession of any part of the amount awarded or voluntarily paid to bring in the same, to abide the judgment of the Court concerning the distribution thereof; and in the case of an award the person or persons by whom the award shall have been made shall, upon monition, send without delay to the said High Court of Admiralty a copy of the proceedings before him and them, and of the award, on unstamped paper, certified under his or their hand; and the same shall be admitted by the Court as evidence, and the amount awarded or voluntarily paid shall be distributed according to the judgment of the Court.

The Court, in certain cases, may adjudicate on claims for services and necessaries, although not on the high seas.

VI. And be it enacted, That the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage, for services rendered to, or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made.

Evidence may be taken viva voce in open court.

VII. And be it enacted, That in any suit depending in the said High Court of Admiralty, the Court (if it shall think fit) may summon before it and examine or cause to be examined witnesses by word of mouth, and either before or after examination by deposition, or before a commissioner, as herein-after mentioned; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the said Court shall direct.

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Evidence may be taken viva voce before a commissioner.

VIII. And be it enacted, That the said Court may, if it shall think fit, in any such suit issue one or more special commissions to some person, being an advocate of the said High Court of Admiralty of not less than seven years standing, or a barrister at law of not less than seven years standing, to take evidence by word of mouth, upon oath, which every such commissioner is hereby empowered to administer at such time or times, place or places, and as to such fact or facts, and in such manner, order, and course, and under such limitations and restrictions, and to transmit the same to the registry of the said Court, in such form and manner as in and by the commission shall be directed; and that such commissioner shall be attended, and the witnesses shall be examined, cross-examined, and re-examined by the parties, their counsel, proctors, or agents, if such parties, or either of them, shall think fit so to do; and such commission shall, if need be, make a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the said High Court of Admiralty is hereby authorized to institute such proceedings, and make such order or orders, upon such report, as justice may require, and as may be instituted or made in any case of contempt of the said Court.

Attendance of witnesses and production of papers may be compelled by subpœna.

IX. And be it enacted, That it shall be lawful in any suit depending in the said Court of Admiralty for the judge of the said Court, or for any such commissioner appointed in pursuance of this act, to require the attendance of any witnesses, and the production of any deeds, evidences, books, or writings, by writ, to be issued by such judge or commissioner in such and the same form, or as nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by her Majesty's Court of Queen's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said judge or commissioner shall be considered as in contempt of the said High Court of Admiralty, and may be punished for such contempt in the said Court.

Provisions of 3 & 4 W. 4. c. 42. extended to Court of Admiralty.

X. And be it enacted, That all the provisions of an act passed in the fourth year of the reign of his late Majesty, intituled "An Act for the further Amendment of the Law, and better Administration of Justice," with respect to the admis-

sibility of the evidence of witnesses interested on account of the verdict or judgment, shall extend to the admissibility of evidence in any suit pending in the said Court of Admiralty, and the entry directed by the said act to be made on the record of judgment, shall be made upon the document containing the final sentence of the said Court, and shall have the like effect as the entry on such record.

Power to direct issues.

XI. And be it enacted, That in any contested suit depending in the said Court of Admiralty the said Court shall have power, if it shall think fit so to do, to direct a trial by jury of any issue or issues on any question or questions of fact arising in any such suit, and that the substance and form of such issue or issues shall be specified by the judge of the said Court at the time of directing the same; and if the parties differ in drawing such issue or issues, it shall be referred to the judge of the said Court to settle the same; and such trial shall be had before some judge of her Majesty's superior courts of common law at Westminster, at the sittings at nisi prius in London or Middlesex, or before some judge of assize at nisi prius, as to the said Court shall seem fit.

Costs of issues and commissions to be in the discretion of the Court.

XII. And be it enacted, That the costs of such issues, or of such commission as aforesaid, as the Judge of the said High Court of Admiralty shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the registrar of the said High Court of Admiralty, in such manner as the said judge shall direct, and that payment of such costs shall be enforced in the same manner as costs between party and party may be enforced in other proceedings in the said Court.

Power to direct new trials.

XIII. And be it enacted, That the said Court of Admiralty, upon application to be made within three calendar months after the trial of any such issue by any party concerned, may grant and direct one or more new trials of any such issue, and may order such new trial to take place in the manner herein-before directed, with regard to the first trial of such issue, and may by order of the same Court direct such costs to be paid as to the said Court shall seem fit upon any application for a new trial, or upon any new trial, or second or other new trial, and may direct by whom and to whom and at what times and in what manner such costs shall be paid.

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Granting or refusing new trial, matter of appeal.

XIV. And be it enacted, That the granting or refusing to grant an issue, or a new trial of any such issue, may be matter of appeal to her Majesty in council.

Bills of exceptions to be allowed on trials of issues.

XV. And be it enacted, That at the trial of any issue directed by the said High Court of Admiralty, either party shall have all the like powers, rights, and remedies with respect to bills of exceptions as parties impleaded before justices may have, by virtue of the statute made in that behalf in the thirteenth year of the reign of King Edward the First, with respect to exceptions alleged by them before such justices, or by any other statute made in the like behalf; and every such bill of exceptions, sealed with the seal of the judge or judges to whom such exceptions shall have been made, shall be annexed to the record of the trial of the said issue.

Record of the issue to be transmitted to the Court of Admiralty.

XVI. And be it enacted, That the record of the said issue, and of the verdict therein, shall be transmitted by the associate or other proper officer to the registrar of the said Court of Admiralty; and the verdict of the jury upon any such issue (unless the same shall be set aside) shall be conclusive upon the said Court, and upon all such persons; and in all further proceedings in the cause in which such fact is found the said Court shall assume such fact to be as found by the jury.

Provisions of 2 & 3 W. 4. c. 92. as to appeals to apply to suits in Court of Admiralty under this act.

XVII. And be it enacted, That every person who, if this act had not been passed, might have appealed and made suit to her Majesty in council against any proceeding, decree, or sentence of the said High Court of Admiralty under or by virtue of an act passed in the third year of the reign of his late Majesty, intituled "An Act for transferring the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to his Majesty in Council," may in like manner appeal and make suits to her Majesty in council against the proceedings, decrees, and sentences of the said Court in all suits instituted and proceedings had in the same by virtue of the provisions of this act, and that all the provisions of the said last-mentioned act shall apply to all appeals and suits against the proceedings, decrees, and sentences of the said Court in suits instituted and proceedings had by virtue of the provisions of this act; and such appeals and suits shall be proceeded in in the manner and form provided by an act passed in the fourth year of the reign of his late

3 & 4 W. 4. c. 41. to apply in same manner.

Majesty, intituled "An Act for the better Administration of Justice in his Majesty's Privy Council;" and all the provisions of the said last-mentioned act relating to appeals and suits from the High Court of Admiralty shall be applied to appeals and suits from the said Court in suits instituted and proceedings had by virtue of the provisions of this act: provided always, that in any such appeal the notes of evidence taken as herein-before provided by or under the direction of the Judge of the said High Court of Admiralty shall be certified by the said judge to her Majesty in council, and shall be admitted to prove the oral evidence given in the said Court of Admiralty, and that no evidence shall be admitted on such appeal to contradict the notes of evidence so taken and certified as aforesaid, but this proviso shall not enure to prevent the judicial committee of the privy council from directing witnesses to be examined and re-examined upon such facts as to the committee shall seem fit, in the manner directed by the last-recited act.

Certified notes of evidence taken may be admitted on appeal.

XVIII. And be it enacted, That it shall be lawful for the Judge of the said High Court of Admiralty from time to time to make such rules, orders, and regulations respecting the practice and mode of proceeding of the said Court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: provided always, that no such rules, orders, or regulations shall be of any force or effect until the same shall have been approved by her Majesty in council.

Power for Judge of Admiralty to make rules of Court.

XIX. And be it declared and enacted, That no action shall lie against the Judge of the said High Court of Admiralty for error in judgment, and that the said judge shall be entitled to and have all privileges and protections in the exercise of his jurisdiction as judge of the said Court which by law appertain to the judges of her Majesty's superior courts of common law in the exercise of their several jurisdictions.

Protection of the Judgeof the Court of Admiralty.

XX. And be it enacted, That the keeper for the time being of every common gaol or prison shall be bound to receive and take into his custody all persons who shall be committed thereunto by the said Court of Admiralty, or who shall be committed thereunto by any coroner appointed by the Judge of the said Court of Admiralty, upon any inquest

Gaolers to receive prisoners committed by the Court of Admiralty or by Admiralty coroners.

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taken within or upon the high seas adjacent to the county or other jurisdiction to which such gaol or prison belongs; and every keeper of any gaol or prison who shall refuse to receive into his custody any person so committed, or wilfully or carelessly suffer such person to escape and go at large without lawful warrant, shall be liable to the like penalties and consequences as if such person had been committed to his custody by any other lawful authority.

Prisoners in contempt may be discharged.

XXI. And be it enacted, That it shall be lawful for the Judge of the said High Court of Admiralty to order the discharge of any person who shall be in custody for contempt of the said Court, for any cause other than for nonpayment of money, on such conditions as to the judge shall seem just: provided always, that the order for such discharge shall not be deemed to have purged the original contempt in case the conditions on which such order shall be made be not fulfilled.

Jurisdiction to try questions concerning booty of war.

XXII. And be it enacted, That the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, her heirs and successors, by the advice of her and their privy council, to refer to the judgment of the said Court; and in all matters so referred the Court shall proceed as in cases of prize of war, and the judgment of the Court therein shall be binding upon all parties concerned.

Jurisdiction of courts of law and equity not taken away.

XXIII. Provided always, and be it enacted, That nothing herein contained shall be deemed to preclude any of her Majesty's courts of law or equity now having jurisdiction over the several subject matters and causes of action hereinbefore mentioned from continuing to exercise such jurisdiction as fully as if this act had not been passed.

Act may be amended this session.

XXIV. And be it enacted, That this act may be repealed, or amended by any act to be passed in this session of parliament.

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3 & 4 VICT. CAP. 66.

An Act to make Provision for the Judge, Registrar, and Marshal of the High Court of Admiralty of England.

[*7th August*, 1840.]

WHEREAS the present manner of remunerating the Judge, Registrar, and Marshal of the High Court of Admiralty of England ought not to be continued, and it is expedient to make other provision for the same, and for defraying the other expences incidental to the said Court; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That a yearly salary of 4000*l.* shall be paid to the Judge of the said High Court of Admiralty, and such salary shall be payable quarterly, and shall be charged upon and paid out of the consolidated fund of the United Kingdom of Great Britain and Ireland: provided always, that any such judge, after the present parliament, shall during his continuance in office as judge be incapable of being elected or sitting as a member of the House of Commons.

Judge of the High Court of Admiralty to be paid by salary.

Not to sit in future parliaments.

II. And be it enacted, That an act passed in the fiftieth year of the reign of King George the Third, intituled "An Act for regulating the Offices of Registrars of Admiralty and Prize Courts," is hereby repealed, and that the registrar of the High Court of Admiralty shall receive, out of the fee fund herein-after mentioned, a yearly salary of 1400*l.* instead of all fees, dues, perquisites, emoluments, and profits heretofore received by or on account of or for such registrar as aforesaid: provided always, that in time of war or other extraordinary circumstances causing a great increase of business in the office of registrar of the Court it shall be lawful for her Majesty, on the recommendation of the Judge of the High Court of Admiralty, to direct that the yearly salary of the said registrar be increased to such sum, not exceeding 2000*l.*, as her Majesty shall be pleased to direct;

Repeal of 50 G. 3. c. 118.

Registrar to be paid by salary.

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and such increased salary shall thenceforward continue to be paid to the said registrar, instead of his salary as fixed by this act, and subject to all the provisions respecting the same, until her Majesty shall be pleased to direct that such increased salary be again reduced.

Appointment of registrar.

III. And be it enacted, That the person last before the passing of this act executing the duties of deputy registrar of the said Court shall be the first registrar thereof under and by virtue of this act, and he shall hold the same during his good behaviour, subject to be removed by the judge of the said Court for good and reasonable cause, such removal to be approved of by the Lord High Admiral of the United Kingdom of Great Britain and Ireland for the time being, or by the Lords Commissioners for executing the office of Lord High Admiral, as the case may be; and every registrar hereafter to be appointed for the said High Court of Admiralty shall be appointed, and for good and reasonable cause be removable, by the judge of the said Court, such appointment and removal respectively being subject to the approbation of the said Lord High Admiral or the said Lords Commissioners, as the case may be; and every such registrar shall be taken from among proctors practising in the said Court, and of ten years standing at least.

Registrar shall attend the privy council at the hearing of causes and appeals instead of the registrar of the Court of Chancery.

IV. Provided always, and be it further enacted, That the first registrar under and by virtue of this act, and every registrar to be hereafter appointed, shall, subject to such orders as her Majesty in council shall from time to time make, attend the hearing by the judicial committee of the privy council of all causes and appeals which the registrar of the High Court of Admiralty was entitled to attend in person or by deputy by virtue of his office of registrar of the High Courts of Admiralty, delegates, and appeals for prizes, before the passing of an act passed in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the better Administration of Justice in her Majesty's Privy Council," and likewise shall, subject to any order of her Majesty in council, transact, perform, or do all acts, matters, and things that shall be found necessary or have heretofore been done by the said registrar or his deputies in respect of such causes and appeals.

3 & 4 W. 4. c. 41.

Marshal to be paid by salary.

V. And be it enacted, That the marshal of the High Court of Admiralty shall receive out of the fee fund herein-after

mentioned a yearly salary of 500*l.*, besides such travelling and other expences necessarily incurred in the execution of his duty as the Judge of the Admiralty Court, with the approbation of the Commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, shall allow, instead of all fees, dues, perquisites, emoluments, and profits, heretofore received by or on account of such marshal: provided always, that in time of war and other extraordinary circumstances causing a great increase in the business of the office of marshal of the Court, it shall be lawful for her Majesty, on the recommendation of the judge of the Court, to direct that the yearly salary of the marshal be increased to such sum, not exceeding 800*l.*, as her Majesty shall be pleased to direct; and such increased salary shall thenceforward continue to be paid to the marshal instead of his salary as fixed by this act, and subject to all the provisions respecting the same, until her Majesty shall be pleased to direct that such increased salary be again reduced.

Salary may be increased in time of war.

VI. And be it enacted, That the Judge of the High Court of Admiralty, subject to the approval of the Lord High Admiral, or any three or more of the commissioners for executing the office of Lord High Admiral, shall appoint so many officers as he shall think necessary for executing the process of the said Court, and also so many clerks and servants as he shall think necessary for carrying on the business of the said Court; and the said judge, with the like approval, may remove, at pleasure, all or any of the clerks, officers, and servants so appointed; and the Commissioners of her Majesty's Treasury shall fix the salaries of all such clerks and servants; and the officers for executing the process of the Court shall be paid such allowances, and such travelling and other expences necessarily incurred in the execution of their duty, as the Judge of the Admiralty Court, with the approbation of the Commissioners of her Majesty's Treasury, shall allow; and the salaries of all the clerks and servants, and all such allowances and expences, and all other expences of carrying on the business of the said Court, not otherwise provided for, shall be paid out of the fee fund herein-after mentioned, and shall be allowed in the account to be rendered by the registrar as herein-after provided.

Clerks, &c. to be appointed by judge, subject to approval of Lord High Admiral.

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Retiring pension to judge.

VII. And be it enacted, That it shall be lawful for her Majesty, by letters patent under the great seal of Great Britain, to give and grant an annuity, not exceeding the yearly sum of 2000*l.*, to any person who shall have executed the office of Judge of the High Court of Admiralty, and shall have resigned the same, to be paid quarterly, and to be charged upon and paid out of the consolidated fund of the United Kingdom of Great Britain and Ireland, such annuity to commence from the time at which such judge of the said Court shall have resigned his said office, and to continue thenceforth during the natural life of the grantee: provided always, that no such annuity shall be granted unless either the grantee shall have been judge of the said Court during at least fifteen years, or unless such person shall be afflicted with some permanent infirmity disabling him from the due execution of his said office, which shall be expressly recited in the grant: provided also, that if the grantee of any such annuity shall hold any other office of profit under her Majesty he shall be entitled to receive so much only of the said annuity as, together with the salary and profits of such other office, shall not exceed the sum of 2000*l.*

Salaries and annuities, how to be paid.

VIII. And be it enacted, That the said salaries and annuities shall be paid, free and clear of all fees, taxes, and charges whatsoever, by four equal quarterly payments, on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October in every year: provided that the payment to be made in each case on the 1st of the said quarterly days which shall happen after the accrual of the right thereunto of the person receiving the same under this act, shall be a rateable proportion of a quarter's salary according to the time then elapsed since the accrual of such right, and in case of vacancy in the office of any judge, registrar, or marshal, or of any clerk, officer, or servant, receiving a salary under this act, whose salary is fixed by this act, of the High Court of Admiralty, the person making the vacancy, his executors or administrators, shall be entitled to a proportional part of his quarterly salary according to the time elapsed between the vacancy and the last quarterly payment.

Office of registrar not to be executed by deputy.

IX. And be it enacted, That the office of registrar of the High Court of Admiralty shall not in future be executed by deputy, except in case of illness or absence for any cause to

be allowed by the judge, but the person appointed registrar shall, by himself, or with an assistant, in case an assistant shall be necessary, personally execute the duties thereof: provided always, that the judge, surrogate, commissioner, or other substitute of the judge, may, according to the established law and practice of the said Court, from time to time, and as occasion may require, assume an actuary for the purpose of recording acts: provided also, that the said registrar may, with the approbation of the judge, from time to time appoint such and so many proctors of the said Court as may be deemed necessary, to be examiners thereof.

Appointment of deputy registrar in case of illness, &c.

X. And be it enacted, That it shall be lawful for the said registrar, from time to time as occasion may require, to appoint a deputy or assistant, being a proctor of the said Court, to act for the said registrar, in case of his absence from illness or other reasonable cause allowed by the judge, such deputy or assistant to be first approved by the Judge of the High Court of Admiralty, and no such deputy or assistant shall continue to act for any longer time than shall be allowed and specified in and by the order which shall be made by, on each occasion, the Judge of the High Court of Admiralty: provided, that in case any registrar of the said Court who shall be prevented by illness from giving his personal attendance, shall omit for the space of two days to appoint such deputy or assistant, the Judge of the High Court of Admiralty shall, if he shall see fit, himself appoint such deputy or assistant, and direct what part of the salary of such registrar shall be received by such deputy or assistant, and the same shall be paid over to and received by him accordingly.

Judge of Admiralty may direct the appointment of an assistant registrar;

XI. And be it enacted, That at any time when the state of the business of the said Court shall appear to require the appointment of an assistant registrar, the Judge of the High Court of Admiralty may direct the registrar to make such appointment; and such assistant registrar, being one of the proctors of the said Court, shall thereupon be appointed by the registrar, subject to the approval of the judge of the Court, and for such time as the judge may think necessary, and shall be entitled to receive a salary, not exceeding 1200*l.*, as her Majesty shall be pleased to direct, which salary in either case shall be paid out of the same fund and

his salary.

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be subject to the same provisions as are herein enacted with respect to the payment of the salary of the registrar.

Account of increase in salaries and appointments to be laid on the table of the House of Commons.

XII. Provided always, and be it further enacted, That the Judge of the High Court of Admiralty shall cause to be laid on the table of the House of Commons, within fourteen days of making the increase of salaries or the appointments herein-after mentioned, if parliament shall be then assembled, or if parliament shall not be sitting then within fourteen days next after the assembling thereof, an account of all increase of salaries made under the authority of this act, and of all appointments of officers, clerks, and servants made under this act, by the said judge, with the consent or approbation of the Lord High Admiral or commissioners for executing the office of the Lord High Admiral, or by the registrar with the consent or approbation or by the direction of the said judge, with an account of the salaries directed to be paid to such officers, clerks, and servants.

Her Majesty may alter the table of fees.

XIII. And be it declared and enacted, That it shall be lawful for her Majesty to regulate the fees of the said Court, and to amend and alter the table of fees therein, as by her Majesty, with the advice of her privy council, shall be thought fit.

Registrar to account annually for all fees received by him.

XIV. And be it enacted, That the registrar of the High Court of Admiralty shall, on or before the twentieth day of January in every year, render to the Lord High Treasurer or the Commissioners of her Majesty's Treasury, upon oath, to be sworn before the Judge of the High Court of Admiralty or a surrogate of the said Court, a true account in writing of the gross and net amount of all such fees and emoluments as shall have become due in the preceding year ending on the fifth day of January on account of the judge of the said Court, by virtue of his office as such judge, or on account of the marshal or any other officer of the said Court, specifying the particulars of the payments, disbursements, allowances, and charges constituting the difference between such gross and net amounts, and also a like account of all the fees, dues, perquisites, emoluments, and profits received by or on account of or for the registrar of the said Court of Admiralty; and the marshal, seal-keeper, and every other officer of the Court, in the receipt of any fees for business done in the said Court, shall render to the registrar upon oath, to be sworn before the judge or a surrogate of the Court, a true

account in writing of all the fees respectively received by each of them, at such times and subject to such regulations as the judge of the Court from time to time shall think fit to direct.

Fees to be carried to Fee Fund.

XV. And be it enacted, That all the fees so received on account of the judge and marshal or any other officer of the Court of the said High Court of Admiralty, and also all the fees, dues, emoluments, perquisites, and profits received by or on account of the said registrar after the expiration of the interest at present vested in possession in the said office of registrar, shall be carried by the registrar to an account to be opened and kept in the Bank of England of a fund to be called "the Fee Fund of the High Court of Admiralty;" and out of the said Fee Fund there shall be paid by the said registrar, at the times and in the manner herein-before directed, the salaries of the registrar, assistant registrar, and marshal, and of the clerks, officers, and servants of the said Court, and all expences of holding and carrying on the business of the said Court not otherwise provided for; and in case there shall be at any time a deficiency in the said Fee Fund, so that the same shall not be sufficient to discharge the several salaries and sums of money herein-before charged thereon, the Judge of the High Court of Admiralty shall, by writing under his hand and seal, certify to the Lord High Treasurer, or to the Commissioners of her Majesty's Treasury, the amount of such deficiency; and the Lord High Treasurer, or any three of such commissioners, shall forthwith, upon the receipt of such certificate, direct that there be issued and paid out of and charged upon the Consolidated Fund of the United Kingdom of Great Britain and Ireland, to the principal or deputy registrar of the said Court, on account of the Fee Fund of the said Court, such a sum of money as shall be sufficient to cover the deficiency so certified to them as aforesaid.

Surplus to be paid to the Consolidated Fund.

XVI. And be it enacted, That when and so often from time to time as the said Fee Fund shall amount to such a sum as shall be sufficient to pay all the salaries and sums of money herein-before charged thereupon, and there shall be a surplus remaining after such payment, the registrar of the High Court of Admiralty shall, once in every quarter of a year, (that is to say,) on or before the twentieth day of April, the twentieth day of July, the twentieth day of

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October, and the twentieth day of January, pay such surplus (if any) into the Bank of England, to the credit of her Majesty's Exchequer, to the account of the said Consolidated Fund.

Treasury, by warrant, to direct payments out of Consolidated Fund.

XVII. And be it enacted, That it shall be lawful for the commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland for the time being, and they are hereby authorized and required by warrant under their hands, or the hands of any three of them, to direct the several payments aforesaid to be made out of the Consolidated Fund as herein-before prescribed.

Judge and registrar to receive no fees on their own account.

XVIII. And be it enacted, That neither the judge, nor any future registrar, assistant registrar, or marshal of the High Court of Admiralty, shall be entitled to, or take for his own use or benefit, directly or indirectly, any fee or emolument whatsoever, save the salary, allowance, or annuity to which he shall be entitled by virtue of this act.

Accounts may be referred to judge of Court of Admiralty and to Dean of Arches.

XIX. And be it enacted, That in case the said Lord High Treasurer, or any three or more Commissioners of her Majesty's Treasury, for the time being, shall be dissatisfied with any account to be rendered to them as aforesaid, it shall be lawful for him or them to refer the same to the Judge of the High Court of Admiralty and to the Dean of the Arches, or to either of them, who shall thereupon, by such ways and means, and by the examination of such persons as they or he shall think fit, and upon oath, if they or he shall think the same necessary (which he or they is and are hereby authorized to administer), inquire into the said accounts, or any entry therein, and all or any of the disbursements, allowances, or charges therein contained, and make such allowances and disallowances therein as he or they shall think reasonable, and shall finally settle and certify in writing the net amount of the fees and emoluments to which such account relates.

Act may be amended.

XX. And be it enacted, That this act may be amended or repealed by any act to be passed in this session of parliament.

APPENDIX (C).

Several Sections of the Act, 9 & 10 Vict. Cap. 99., which relate to the Jurisdiction of the High Court of Admiralty.

(ACTS repealed by the second section:—12 Anne, s. 2. c. 18.; 4 G. 1. c. 1.; 26 G. 2. c. 19.; 49 G. 3. c. 122.; 53 G. 3. c. 87.; 53 G. 3. c. 140.; 1 & 2 G. 4. c. 75.; so much of the 3 & 4 Vict. c. 65. s. 5. (Appendix A.), as relates to awards made by justices and others in salvage cases, and appeals therefrom; so much of 8 & 9 Vict. c. 86., as relates to persons in possession of derelict, jetsam, flotsam, or wreck, &c; 4 G. 1. c. 4.; so much of 11 G. 2. c. 9. as makes the 4 G. 1. c. 4. perpetual; so much of 17 G. 2. c. 11. as relates to salvage proceedings; 23 & 24 G. 3. c. 48. By section 3., receivers of Admiralty droits to be appointed, and their names and addresses to be posted at custom houses and at Lloyd's. By section 4., lords of manors, &c., claiming a right to wreck, to give notice to a receiver. By section 5., all persons finding wreck, &c., to report and deliver it forthwith to a receiver or officer of the customs. By section 6., receivers and officers of customs may by warrant seize goods not reported or delivered, who shall be entitled to salvage: "Provided always, that it shall be lawful for any receiver, as often as the case may arise when articles or droits of Admiralty found within the jurisdiction of the High Court of Admiralty shall be carried away out of such jurisdiction, either within the limits of the Cinque Ports or elsewhere, to seize and carry away the same, and place them in some warehouse or other place of security, to be dealt with in the same manner as is hereby directed and provided in the case of articles which shall have been so reported as aforesaid." By section 7., receivers to send to principal officer of customs at nearest port, a report of goods reported or seized when they amount to 20*l.* in value; a copy of the report to be posted at Lloyd's. By section 8., receivers to give notice to lords of manors, &c., of the finding of wreck claimed by them. By section 9., owners of wreck may in making good their claim within twelve months, have

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it delivered up to them. By section 10., wreck &c., not being claimed by the owner within twelve months, lords of manors, &c., may make good their claim within one month following. By section 11., if not so claimed within such period, to be sold without any legal process as droits of Admiralty.)

Reasonable salvage to be allowed to persons saving ships or goods.

XIX. And be it enacted, That every person (except receivers under this act) who shall act or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, or of any goods, jetsam, flotsam, lagan, or derelict, or of any anchors, cables, tackle, stores, or materials which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise, and whether such person shall have so acted at the request of, or on application by any person in authority, or by the master or owner of any ship or vessel, or otherwise, shall, within fourteen days after the service so performed, or within fourteen days after the owner or any other person shall have established his claim to any such article as aforesaid, be paid a reasonable reward or compensation by way of salvage for such service, by the commander, master, or other superior officer, mariners, or owner of the said ship or vessel, or their agent, or by the merchant whose ship, vessel, or cargo shall be so saved as aforesaid, or by the owner of the other articles herein-before mentioned, or other person claiming the same; and in default thereof, the said ship or vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, shall remain in the custody of the High Court of Admiralty, and the said goods or other article (and also, until warrant issued from the High Court of Admiralty, the said ship, vessel or cargo,) shall remain in the custody of the receiver or officer of the customs until the person so acting or employed in the preservation of such ship or vessel, goods, or other article as aforesaid, shall have been reasonably compensated for his said assistance and trouble, or reasonable security given for that purpose to the satisfaction of the said receiver or officer of the customs, or High Court of Admiralty: Provided always, that every receiver who shall act or be employed in the saving or preserving of any ship or vessel in distress, which shall not become a droit of

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Admiralty, shall be entitled to receive from the owner thereof the sum of two pounds for the first day, and the further sum of one pound for every subsequent day on which he shall be employed in the said service, if the said ship or vessel, together with the cargo thereof, shall be of or above the value of six hundred pounds, and the said receiver shall be entitled to a moiety of such respective sums, if the said ship and cargo shall be under the value of six hundred pounds; and the said ship or vessel shall be so detained as aforesaid until such sums shall have been paid to the said receiver.

Receiver general may make rules for regulating salvage in certain cases.

XX. And be it enacted, That it shall be lawful for the said receiver general to make rules, and vary and alter the same, from time to time, as he may think proper, for regulating the rate of salvage to be paid by the receivers when any ship, vessel, boat, apparel, anchor, cable, tackle, stores, materials, goods, merchandise, or other article whatsoever shall not be proved to belong to any owner or other person, and shall be sold as droits of Admiralty in manner hereinbefore directed.

If owners and salvors disagree respecting salvage, two justices, or a person nominated by them, may determine the same.

XXI. And be it enacted, That if any person shall have rendered any service (except ordinary pilotage) in the saving or preserving of any ship or vessel in distress, or of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, goods or other article hereinbefore mentioned, which shall not become droits of Admiralty, and the said person, and the master or owner of such ship or vessel, or his agent, or the owner of such article, or his agent, cannot agree upon the amount of salvage or compensation to be paid in respect of such service, then such person shall deliver to such master, owner, or agent, a statement in writing, without prejudice to either party, of the amount of salvage or compensation claimed for such services, and (unless such salvage shall have been already paid by any receiver under the powers herein-before contained, or the claim thereto shall exceed the sum of two hundred pounds,) the matter or difference may be determined by any two justices of the peace, residing at or near to the place where such service has been rendered, within forty-eight hours after such difference shall be referred to them for their determination thereof, and if they cannot agree respecting the same, then it shall be lawful for them to nominate any third person conversant in maritime affairs, at their option,

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who shall ascertain the amount of salvage to be paid within forty-eight hours after he shall be so nominated as aforesaid; and the said justices and such third person so nominated as aforesaid shall have full power and authority, whenever they see occasion, to examine the parties or their witnesses upon oath, which oath, they or any one of them are and is hereby authorized to administer; and it shall be lawful for the person so to be nominated by the said justices, who shall decide on the amount of salvage to be paid as aforesaid, to demand and receive of and from the owner of the ship or vessel aforesaid, or of the article so saved as aforesaid, or of the salvors or their respective agents, a sum of money not exceeding two pounds two shillings; and such owner or his agent, or such salvors, at the discretion of the said justices or person appointed by them as aforesaid, are hereby required to pay the same to the person so nominated as aforesaid, immediately after he shall have made his award or decision, and such sum of two pounds two shillings, and such amount of salvage, may be recovered as any penalty imposed by this act: Provided always, that when the salvage claim shall exceed the sum of two hundred pounds, then and in every such case the said matter or difference shall, in the event of no such agreement being made as aforesaid, either by reference to arbitration or otherwise, be determined exclusively by the High Court of Admiralty.

Admiralty may appoint salvage commissioners to determine differences where they think fit, and appoint a secretary, &c.

XXII. And be it enacted, That it shall be lawful for the Commissioners of Admiralty to nominate and appoint, in such ports or towns and for such districts as in their discretion they may think fit, three or more proper persons for each port, town, or district, respectively, to be called commissioners of salvage, who, or any three or more of them, shall have power to adjust and determine any difference respecting salvage, in the same manner and in such cases as the justices herein-before in that respect mentioned, and also to nominate and appoint a proper person to act as secretary or registrar to the said commissioners, and which secretary or registrar shall enter in a book, kept for that purpose, all the proceedings of such commissioners and also a copy of the awards which they shall have from time to time made; and the said commissioners of salvage, or any three or more of them, shall have the power of examining on oath, and all other the same power and authorities as are

Commissioners empowered to examine on oath.

herein-before given to the said justices, and to the person to be by them nominated as aforesaid; and such commissioners of salvage, or any three or more of them, who shall decide in any such case as aforesaid, and their secretary or registrar, may, and they are hereby authorized to demand of and from the owner of any ship or vessel, or of any article against whom any person may make any claim or demand for service rendered on preserving the same, and such owner or salvors is and are hereby required to pay such fee or reward for deciding on every such claim as shall be regulated and appointed in that behalf by the Commissioners of the Treasury; and the said commissioners of salvage, or any three or more of them, shall have the power to commit for contempt.

Parties dissatisfied may appeal to High Court of Admiralty, and goods to be restored to owners on giving bail.

XXIII. And be it enacted, That in case any person so claiming to be entitled to salvage or compensation for services rendered as aforesaid, or the person against whom such claim is made, or his agent, shall be dissatisfied with such award and decision of the said justices or person so to be nominated by them as aforesaid, or of the said commissioners of salvage, it shall be lawful for either of them respectively, within ten days after such award shall have been made, but not afterwards, to notify to such justices, or to the said commissioners of salvage, as the case may be, his desire of obtaining the judgment of the High Court of Admiralty, respecting the said salvage or compensation, and thereupon such person shall forthwith proceed by taking out a monition within thirty days from the date of such award; but in such case the receiver or officer of the customs in whose custody the ship, vessel, goods, or other article in respect of which such claim of salvage has been made shall have been detained as aforesaid, is hereby required and empowered to release such ship or vessel, and to deliver to the owner or proprietor, or his agent, such goods or other article, upon the said owner or proprietor, or his agent, giving good and sufficient bail in double the amount of the sum awarded for salvage or compensation, or if no sum shall have been so awarded, then to such amount as the said receiver shall deem sufficient, and which bail the said receiver is hereby authorized to take and certify according to the form contained in the schedule (A.) hereunto annexed, and transmit the same without delay to the said receiver-general, together with a true certificate in writing of the gross value of the

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article respecting which salvage shall be claimed, and also a copy of such proceedings and award, on unstamped paper, certified under the hand of the said receiver, taking such bail as aforesaid, and the same shall be admitted by the said Court of Admiralty as evidence in the cause; and the said receiver shall for every such certificate be entitled to receive from the owner of such ship or vessel, goods or other article, or his agents, or from the proceeds of the sale thereof, the sum of one pound one shilling.

Receiver, where award by commissioners of salvage has been made, empowered to sell ship or goods, &c. in case of refusal of owner to comply with terms of award, or of neglect to appeal.

XXIV. Provided always, and it is hereby enacted, That after any such award has been made, either by the said justices or person nominated by them, or by the said commissioners of salvage as aforesaid, and the owner of such ship or vessel, goods or other article, in respect of which such award of salvage is made, or his agent, shall refuse or neglect either to pay the same, or to give notice of such appeal, or to take out such monition as aforesaid, it shall be lawful for the receiver, at or nearest to the place where such award has been made, and he is hereby required, within twenty days after the making of the said award, and on production of the same, to sell the property contained in such ship or vessel, or the said goods or other articles, as the case may be, or such and so many of the same as in his opinion will be sufficient to defray the salvage, and the costs and charges relating thereto, paying the surplus, if any, to the owner or owners thereof: Provided also, that in all cases which shall be decided by any justices of the peace, or their nominee, or by the said commissioners of salvage, the High Court of Admiralty shall only have jurisdiction as a Court of Appeal in accordance with the provisions of this act, or for the purpose of enforcing payment of the sum awarded.

Commissioners or justices to appoint to whom salvage to be paid for distribution between two or more persons.

XXV. And be it enacted, That whenever any sum to be paid for any such services as aforesaid, either voluntarily or in consequence of any agreement, or of any arbitration, or of any award made by any such justices or by the said commissioners of salvage as aforesaid, or, within the jurisdiction of the Cinque Ports, by any commissioners, shall be distributable between two or more persons, such sum shall be paid to such person as shall be appointed by the justices or commissioners in and by their award, or by the arbitrator making any award, or under any agreement which may have

been made, or in default of any such appointment, then to the master or owner of the boat, ship, or vessel having rendered the services, or his agent, or to some person nominated in writing, by or on behalf of the majority of the persons among whom such sum is distributable; and every person to whom any such sum shall be paid, shall, within three days after the same shall have been paid, or as soon after as may be, proceed to make allotment thereof among the several persons interested in the distribution thereof, and to give notice, in the form contained in the schedule (B.) to this act annexed, to each person of the whole sum so paid, and of the share thereof allotted to him; and within thirty days after the sum shall have been so paid, or within twenty-eight days after such notice shall have been given, and not afterwards, it shall be lawful for any person claiming a share of the said sum who shall think himself aggrieved, either by no allotment having been made, or by no notice thereof having been given to him within ten days after the sum shall have been so paid, or by the insufficiency of the share allotted to him or otherwise, to apply, if the share so allotted, or, if no share shall be so allotted, then if the share claimed by him shall be under twenty pounds, to the justices or commissioners who may have determined such salvage case, or within whose jurisdiction such salvage case may have occurred, who shall have full power to adjudge the due distribution of the sum so paid as aforesaid, and the shares of the different parties entitled thereto, which shares may then be recovered from the person to whom such sum shall have been so paid, in like manner as is hereby provided for the recovery of any penalty under this act; and if the share which shall be so allotted, or, if no share has been allotted, which shall be so claimed by the person so thinking himself aggrieved as aforesaid, shall amount to twenty pounds, then it shall be lawful for such person within the said term of thirty days, or the said term of twenty-eight days (but not afterwards) to apply to the Judge of the High Court of Admiralty, or his surrogate, for a monition against the person to whom the said sum hath been so paid as aforesaid, to bring the said sum, or any part thereof, which shall appear not to have been duly distributed into the registry of the said Court, and appear, and abide the judgment of the said Court, concerning the distribution thereof; and the judge of

Duties of distributor.

In case of delay or injustice, aggrieved parties to apply to justices or commissioners, or to High Court of Admiralty.

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the said Court or his surrogate, shall, on due cause shown, issue such monition, and the said Court shall have jurisdiction to enforce the same, and to adjudge the due distribution of such sum accordingly, and in the case of an award the person by whom such award shall have been made, shall, upon monition, send in, without delay, to the said Court a copy of the proceedings before him, and of the award, on unstamped paper, witnessed under his hand, and the same shall be admitted by the Court as evidence in the cause and the amount so awarded, or such part as shall appear not to have been duly distributed, shall be paid to the parties suing out such monition, or distributed according to the judgment of the said Court.

After sum awarded for salvage services shall have been paid, persons feeling aggrieved by insufficiency of share precluded from enforcing claim against ship, &c. to which services were rendered.

XXVI. And be it enacted, That whenever it shall appear that any sum which has been awarded, or voluntarily agreed to be paid for salvage services shall have been duly paid by the master or owner of any ship, vessel, or goods to which such service shall have been so rendered, or his agent, to the appointee of the justices or commissioners, or of the arbitrator making any award, or under any agreement, or in default of such appointment to the master or owner of the boat, ship, or vessel having rendered such services, or to the person nominated as aforesaid, as the case may be, then and in every such case any person claiming any share in such sum who may think himself aggrieved by the insufficiency of the share allotted to him, or otherwise, shall be precluded from enforcing such claim against the ship, vessel, or goods to which such services shall have been rendered, or the owner thereof: Provided always, that any party who shall claim to be entitled to any sum which shall remain undistributed in the hands of any person to whom the same may have been paid may, within twelve months after such payment, have the same remedies for the recovery of such sum from the person to whom the same shall have been paid, as are herein-before provided respecting the recovery of shares in any sum paid for salvage services after adjudication of the distribution thereof.

High Court of Admiralty may decide in all salvage cases, whether on sea or land.

XL. And be it enacted, That the High Court of Admiralty shall have jurisdiction to decide, in manner herein-before mentioned, upon all claims and demands whatsoever in the nature of salvage for services performed except in cases of goods herein-before directed to be sold as droits of

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Reservation of rights of the Crown, of the High Court of Admiralty, and Admiralty of the Cinque Ports.

XLVII. Provided also, and be it enacted and declared, That neither this act nor anything herein contained shall in anywise extend, or be construed to extend to deprive or in any way prejudice the rights of her Majesty, her heirs or successors, nor to the taking away, abridging, or impeaching in any manner whatever the jurisdiction of the High Court of Admiralty, or the jurisdiction of the Admiralty Court of the Cinque Ports, two ancient towns and their members, but it shall and may be lawful for the said Courts respectively, and the judges thereof for the time being, to have, use, exercise, and enjoy jurisdiction over all such matters, rights, and offences as they have heretofore used, exercised, and enjoyed, as fully and effectually, to all intents and purposes whatever, as if this act had not been made, anything herein contained to the contrary thereof in anywise notwithstanding.

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THE END

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